In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 701.

SYLVESTER POLIAFICO,
SALVATORE LAZZARO,
NUNZIO ROMANO,
BEN YOSLOVITZ,
ANTHONY CRISCI,
SALVATORE PERRI,
MICHAEL ERRA,
ANTHONY NASELLI,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Now come Henry C. Lavine, Attorney for Sylvester Poliafico and Anthony Naselli; Jacob W. Friedman, Attorney for Salvatore Lazzaro and Nunzio Romano; Frank E. Steel, Attorney for Ben Yoslovitz; George J. Todaro, Attorney for Anthony Crisci; and William D. O'Neill and Nathan D. Seeberg, Attorneys for Salvatore Pieri and Michael Erra, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the order of the United States District Court for the Northern District of Ohio, which Court imposed a prison sentence on each of the petitioners.

OPINIONS BELOW.

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, p. 1a, is reported at 237 F. 2d 97. There was no opinion by the District Judge.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 31st, 1956 (App., *infra*, p. 32a). A timely petition for rehearing was denied on November 26th, 1956 (App., *infra*, p. 32a). On December 21st, 1956, Mr. Justice Reed duly extended to and including January 25th, 1957, the date for the filing of this petition. The jurisdiction of this Court is invoked under: 18 U. S. C. 2(a); 18 U. S. C. 371; 21 U. S. C. 174; 26 U. S. C. 2553(a); 26 U. S. C. 2554 (a); Federal Rules of Criminal Procedure, Rule 17c.

QUESTIONS PRESENTED.

1.(a) Whether the reading from the Grand Jury testimony of Government witnesses Brunello and Artino, together with their statements previously made to the Government narcotic agents, over timely and proper objection of counsel, constituted reversible error in view of the fact that the answers of these witnesses to Government counsel were not such prior contradictory statements as to permit cross-examination to the extent shown in the record under the theory that same was being used to "refresh the memory" and also on the "ground of surprise."

(b) Whether the belated admonition of the Court to the jury to "forget" this testimony and "not to consider any of it," cured the error that was committed.

2.(a) Whether the refusal by the District Court to instruct the District Attorney to make available to the defense counsel the written statements of the witness Man-

danici in order that they be used as desired in cross-examination constituted reversible error.

(b) Whether such error was cured by an offer, four days after the conclusion of the witness Mandanici's testimony, to furnish these statements to the defense if the defense would recall the witness Mandanici for additional cross-examination.

3.(a) Whether in the face of an order of exclusion of witnesses, the fact that a defendant, Filicia, who sat in the courtroom for ten days in that capacity then suddenly entered a plea of guilty and immediately became a witness for the Government and testified in corroboration of other Government witnesses, over objection of counsel, constituted prejudicial and reversible error.

(b) Whether such conduct on the part of the Court in permitting this testimony over timely and proper objection constituted a mistrial.

4.(a) Whether the District Judge was right in excluding the testimony of Mrs. Giaimo on the ground that the defense was required to lay a foundation by first interrogating the witness Mandanici regarding his conversations with her, or whether it constituted error.

(b) Whether such refusal deprived the appellants of a defense which, if permitted, would have been supported by ample evidence, or whether it constituted reversible error on the ground that it violated the defendants' constitutional rights to present a theory of their defense.

5. Whether the Court's refusal to permit the disclosure of witness Mandanici's address was within the Trial Judge's discretion to control the scope and extent of cross-examination, or whether it was a deliberate failure to carry out the mandate of the Supreme Court in an exact situation in the case of *Alford vs. United States*, 282

U. S. 687, and whether the petitioners' constitutional rights were violated when the Trial Judge denied them the right of cross-examination.

6. Whether the District Court's conflicting and inconsistent instructions to the jury constituted prejudicial and reversible error, and whether such instructions violated the defendants' constitutional rights.

7. Whether the refusal by the District Court to charge as requested in regard to the defendant Poliafico's character evidence constituted prejudicial and reversible error.

8. Whether the constitutional rights of the petitioners were violated by the ruling of the Trial Judge when said Judge denied the petitioners' request for a hearing on the method and manner of the selection of the petit jury, it being claimed that the method of selection was an unconstitutional one.

9. Whether motions to dismiss the indictment and a verdict of acquittal in favor of petitioner Pieri should have been granted by the Trial Court on the ground of variance between the proof on trial and the charge in the indictment, and whether such refusal by the District Court constituted reversible error.

10. Whether the Court's refusal to enter judgment of acquittal as to Counts 11 and 16 as against Pieri and Poliafico constituted reversible error inasmuch as variance was shown between the charge in the indictment and the proof that was adduced at the trial.

11. Whether there was competent proof that the substance alleged to have been sold by petitioner Crisci was heroin.

12. Whether there was error in the Court's refusal to correctly charge the jury on the effect of the defendant Crisci's failure to testify.

13. Whether the trial court erred in curtailing the cross-examination of the witness Mandanici on the supposed basis of privilege attaching to a prior attorney and client relationship.

STATUTES INVOLVED.

18 U. S. C. 2(a):

"2. Principals.—(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

18 U. S. C. 371:

"Section 371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645 Sec. 1, 62 Stat. 701.)

21 U. S. C. 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drugs into the United States contrary to law, or conceals or in any manner facilitates the transportation, concealment, of such narcotic drugs after being imported shall be punished. * * * Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drugs, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

26 U. S. C. 2553(a):

"Purchase, sell, and distribute not in or from the original stamped packages, narcotic drugs: to wit, heroin, a derivative of opium, and cocaine, a derivative of coca leaves, and not having affixed thereon appropriate tax paid United States Internal Revenue stamps as required by law, in violation of Section 2553(a), Title 26, United States Code, and Section 2 (a), Title 18, United States Code."

26 U. S. C. 2554(a):

"Sell, barter, exchange and give away narcotic drugs, to wit, heroin, a derivative of opium, and cocaine, a derivative of coca leaves, not in pursuance of a written order of the person to whom they were sold, bartered, exchanged and given away, on a form to be issued in blank for that purpose by the Secretary of the Treasury of the United States, in violation of Section 2554(a), Title 26, United States Code, and 2(a), Title 18, United States Code."

Federal Rules of Criminal Procedure, Rule 17c: 15 F. R. D. 367.

STATEMENT.

This proceeding arose by virtue of an indictment charging conspiracy to violate narcotic laws and violations of narcotic laws in the Northern District of Ohio and other districts, and resulted in a trial in the District Court at Cleveland, Ohio, lasting about six weeks, before a jury. Eighteen of the defendants who went to trial, including these petitioners, were found guilty and were sentenced by the Court. These petitioners were sentenced as follows:

SYLVESTER POLIAFICO—sentenced to imprisonment for 5 years on Count 1, 5 years on Count 2, 5 years on Count 11, and 5 years on Count 16, and fined $25.00 each on Counts 2, 11 and 16, with fine suspended. The sentence imposed on Count 2 to

run concurrently with that imposed on Count 1, the sentence imposed on Count 11 to run consecutively with that imposed on Counts 1 and 2, and the sentence imposed on Count 16 to run consecutively with that imposed on Counts 2, 11 and 1, making a total of 15 years.

SALVATORE PIERI—sentenced to imprisonment for 5 years on Count 1, 5 years on Count 11, and 5 years on Count 16 and fined $25.00 each on Counts 11 and 16, with fine suspended. The sentence imposed on Count 11 to run concurrently with that imposed on Count 1, and the sentence imposed on Count 16 to run consecutively with that imposed on Counts 1 and 11. Total 10 years.

MICHAEL ERRA—sentenced to imprisonment for 5 years on Count 1.

ANTHONY NASELLI—sentenced to imprisonment for 4 years on Count 1.

NUNZIO ROMANO—sentenced to imprisonment for 5 years on Count 1 and 5 years on Count 2, with the sentences to run concurrently, and fined $10.00, with fine suspended.

SALVATORE LAZZARO—sentenced to imprisonment for 3½ years on Count 1.

BEN YOSLOVITZ—sentenced to imprisonment for 3½ years on Count 1 and 3½ years on Count 2, and fined $25.00 with fine suspended. Sentence on Count 2 to run concurrently with sentence imposed on Count 1.

ANTHONY CRISCI—sentenced to imprisonment for 5 years on Count 1.

The indictment contained sixteen counts consisting of one count of conspiracy and fifteen substantive offenses. It was claimed on the part of the Government that these petitioners conspired together for the purpose of violating

the laws and statutes mentioned hereinabove, and as stated before, the trial lasted about six weeks and upon conviction the above-mentioned sentences were imposed. Bail was denied by the Trial Judge but was granted by the United States Court of Appeals for the Sixth Circuit upon application.

This case was argued in the Sixth Circuit at Cincinnati, Ohio, on February 16th, 1956, and supplemental typewritten briefs were filed after argument. The Court made a finding and wrote an opinion as of August 31st, 1956, which is included in the appendix attached hereto.

REASONS FOR GRANTING WRIT.

The opinion of the Court of Appeals (Appendix pages 1a to 32a, *infra*) presents several questions of law, and, in our opinion, in a number of instances this Appellate Court opinion conflicts with opinions of the United States Supreme Court on similar questions. We also believe the view that was taken by the Appellate Court is contrary to the actualities as they occurred in the Trial Court, and it does appear that in a great many instances the rulings of the District Judge, which were affirmed by the Appellate Court, were partial to the Government. In many instances these rulings constitute prejudicial error, in the opinion of counsel herein, and at least two occasions can be found in the record which called for a mistrial, and a mistrial should have been granted. Undersigned counsel are not unappreciative of the fact that brevity is of the essence in a petition for certiorari, but in view of the number of petitioners, the length of time that the trial consumed, and the extraordinary length of the opinion, it is mandatory upon us that we set forth before this Honorable Court the necessary and decisive questions of law as they appear to us, fully

realizing that it is not possible to set forth in this petition for certiorari all the legal questions that were presented and the rulings thereon. .

QUESTION NO. 1.

(a) Whether the reading from the Grand Jury testimony of Government witnesses Brunello and Artino, together with their statements previously made to the Government narcotic agents, over timely and proper objection of counsel, constituted reversible error in view of the fact that the answers of these witnesses to Government counsel were not such prior contradictory statements as to permit cross-examination to the extent shown in the record under the theory that same was being used to "refresh the memory" and also on the "ground of surprise."

(b) Whether the belated admonition of the Court to the jury to "forget" this testimony and "not to consider any of it," cured the error that was committed.

It is our belief that the Appellate Court was probably in error when it sanctioned the Trial Judge's rulings on admission of the Grand Jury testimony of Brunello and Artino over strenuous objection of counsel. It must be kept in mind here that both these witnesses had previously testified before the Grand Jury, and when Brunello took the stand in the case before the petit jury his first answer to the question of the District Attorney was to the effect that he did testify before the Grand Jury but all that he told the Grand Jury were lies. He did not say that he did not remember, or that he had forgotten, or that he did not want to testify. He merely said, to begin with, that all of his previous testimony before the Grand Jury was false. In plain words, he was confessing to perjury. The District Attorney then asked for the right to cross-examine his wit-

ness on the ground that he desired to refresh his memory, and on the further ground of surprise. Defense counsel objected on the ground that there was nothing to refresh, that there was nothing here to refresh the witness' memory because the witness did not claim that he had forgotten. And on the question of surprise, that that alone does not constitute surprise because there was no contradictory testimony as yet and therefore no damage. We feel that the District Attorney should then have stopped, removed the witness from the stand, and taken proceedings to indict for perjury (which he later did anyway). But the District Attorney proceeded, with the Court's consent over objection of defense counsel, to read to the witness questions and answers of almost sixty pages of Grand Jury testimony. In that way, the District Attorney inflicted damage to the defense because he was permitted in that manner to not only impeach his own witness but to place before the petit jury testimony that was given to the Grand Jury seven months prior under the misnomer of refreshing his memory and on the ground of surprise. It has been our contention throughout that no damage was done to the case up to the point when the District Attorney was given permission to use the Grand Jury testimony in the manner that it was used; that whatever damage done was done by the Government, and they could not claim any damage to their case up to that point. Also, inasmuch as they are not able to claim any damage, the mere surprise is not sufficient because if there is surprise it must be coupled with a damage, "**and the damage claimed must not have been self-inflicted by continuing to put in damaging testimony after the witness' hostility or change of front has been discovered in order to open the gate to let his favorable ex parte statements in.**" (*Young vs. United States,* 97 F. 2d 206.)

Furthermore, and as was mentioned in the brief in the Court of Appeals by appellant Yoslovitz, wherein his counsel states that these witnesses, Brunello and Artino, were questioned as to their Grand Jury statements and their statements to the agents without being asked direct questions laying the foundation for cross-examination or impeachment, he points out that the effect of this method of propounding the previous questions and answers in the Grand Jury testimony and in the statements given to the agents was to introduce hearsay testimony, and the fact that the Court instructed the jury to disregard such questions and answers certainly could not efface the impression that such testimony, improperly received, must have had upon the jury. As one reviewing Court said, it would be impossible in the trial of a case to allow such testimony in and then tell the jury to disregard it and eradicate it from their consideration.

Young vs. United States, 214 F. 2d 232 at 239:

> "We conclude that the reading before the trial jury of the Grand Jury testimony was within neither the rule for refreshing a witness' recollection nor for cross-examination, a witness turning hostile, nor for impeachment, and comes within no exception to the rule excluding hearsay."

In the case at bar this Grand Jury testimony was used to impeach their own witness and is in line with the case of *United States vs. Socony-Vacuum Oil Company*, 310 U. S. 150, 60 S. Ct. 811, where on page 849 the Court said:

> "If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, **it would be reversible error.** Likewise there would be error where under the pretext of refreshing a witness'

recollection the prior testimony was introduced as evidence." (Emphasis ours.)

Here the Court also cites the case of *Rosenthal vs. U. S.*, 8th Cir., 248 F. 684-686. The Court continues:

> "But here the Grand Jury testimony was used simply to refresh the recollection of material facts, not as independent affirmative evidence. *Furthermore, it was not used for impeachment purposes* * * *." (Emphasis ours.)

Again, on page 850 in the *Socony-Vacuum* case, the Court says:

> "The trial judge, as we have said, was alert to stop impeachment."

As is contended by counsel for Lazzaro and Romano wherein he stated that the (District) Court permitted extensive testimony by Government agents as to the circumstances underlying and surrounding the taking of the statements of Brunello and Artino, this was done despite defense objection. The essence of the Court's ruling was as follows:

> "The Court will permit this testimony, as the Court permitted the other testimony as to the method and procedure followed in taking the statements of these witnesses, so that the jury may have before it the statements of the Government agents as well as the statements of the witnesses whose statements were taken as to the manner and method by which the statements were obtained. For no other purpose may this evidence be considered."

It must be remembered that the Government agents were not on trial, nor was the jury called upon to evaluate or adjudge the propriety of their methods. The conclusion is irresistible that the only purpose in introducing this proof was further to fortify the extraneous statements and

grand jury testimony supposedly referred to for a limited purpose. If we assume arguendo that such a purpose was proper, surely the Government should not have been permitted to go to the extreme of bolstering that rigidly qualified proof by a mass of testimony designed to give it affirmative force.

The instructions as to Artino's Grand Jury testimony were inadequate and confusing. Appellant Poliafico has quoted at length from the instructions pertaining to the Brunello situation, to wit, that "all the testimony that relates to the questions and answers purportedly given by this witness before the grand jury must be disregarded by you and removed from your minds entirely." However ineffective this must have been, the Court did not even go so far concerning Artino, merely saying:

> "Now, insofar as the testimony of this witness referred to those statements purportedly made by him before the grand jury and to those statements which he claims were made by someone else in the statement taken in the narcotic bureau, they are not to be considered by you as evidence against any defendant in this case."

Accordingly, even if the evidence had been properly received—which we challenge—the foregoing was certainly not a charge to delete it from the minds of the jurors or to disregard it. If it was not to be considered as evidence against any defendant, for what purpose was it to be considered at all? Certainly the jury could infer that Artino had repeatedly accused the defendants of criminal acts. In reading the instruction long afterwards and analyzing its language, one must give it meticulous attention in the effort to ascertain its significance. As an oral direction to a jury, which necessarily could not have the benefit of scanning it in writing, it is obscure to the point of defeating ready intelligibility.

Finally, on the subject of the futility of asking juries to disregard certain important testimony, we desire to add to the authorities cited the trenchant language of Mr. Justice Jackson in *Krulewitch vs. United States*, 336 U. S. 440, 93 L. Ed. 790:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction."

And as was said by Judge Learned Hand in the case of *Nash vs. U. S.*, 54 F. 2d 1006, 1007:

> "* * * that is the recommendation to the jury of a mental gymnastic, which is beyond not only their powers, but anybody else's."

QUESTION NO. 2.

(a) Whether the refusal by the District Court to instruct the District Attorney to make available to the defense counsel the written statements of the witness Mandanici in order that they be used as desired in cross-examination constituted reversible error.

(b) Whether such error was cured by an offer, four days after the conclusion of the witness Mandanici's testimony, to furnish these statements to the defense if the defense would recall the witness Mandanici for additional cross-examination.

The Government concedes that these statements were withheld from defense counsel until four days after Mandanici had completed his testimony. The fact that cross-examination of Mandanici could then be resumed did not, we submit, operate to undo the serious disadvantage of not having the statements during the original cross-examination. Especially in view of the impatience of the Trial Court and its understandable desire to accelerate the pro-

ceedings, appellants could not have possibly utilized the tardy proffer to the same advantage as if the statements had been accessible in the first instance.

In this connection the case of *United States vs. Carter*, 15 F. R. D. 367, on page 368 holds:

> "If a witness is called by the government, any written statement signed by the witness and in government's possession should be made available to defense counsel *prior to cross examination*, but such statement need not be produced in advance of trial. Fed. Rules Crim. Proc. rule 17(c), 18 U. S. C. A." (Emphasis supplied.)

It is clear that no conviction of petitioners Poliafico, Romano and Lazzaro could have been obtained without the testimony of Mandanici. We refer to the transcript for the occasions when he mentioned these petitioners, in some instances by hearsay testimony.

The Court's ruling precluding the defense from examining these concededly existing statements foreclosed a fertile field of potential inquiry.

The holding in *United States vs. Krulewitch*, 145 F. 2d 76, in the Second Circuit, is persuasive that the refusal of an inspection of the statement of an important prosecution witness is reversible error. Although in that case the appellant was convicted on a retrial, it is noteworthy that the second conviction was reversed by the Supreme Court of the United States (see 336 U. S. 440, 93 L. Ed. 790), for an erroneous ruling as to the admissibility of evidence, and never retried.

QUESTION NO. 3.

(a) Whether in the face of an order of exclusion of witnesses, the fact that a defendant, Filicia, who sat in the courtroom for ten days in that capacity then suddenly entered a plea of guilty and immediately became a witness for the Government and testified in corroboration of other Government witnesses, over objection of counsel, constituted prejudicial and reversible error.

(b) Whether such conduct on the part of the Court in permitting this testimony over timely and proper objection constituted a mistrial.

We do not believe that the circumstance of Filicia's being a defendant who on the tenth day of trial changed his plea to guilty and assumed the role of a Government witness justified a departure from the rule that witnesses be excluded prior to their being called. The Government supposedly intended to present his case without his help, and there is no exigency incident to the administration of justice which necessitated the utilization of the opportunity to procure his testimony. The situation comes within the prohibition of *Caldwell vs. United States*, 205 F. 2d 879.

Particular stress should be placed upon the avenues opened to duplicity and fraud in an approval of the procedure allowed herein. In every case involving a number of defendants, it would be a tremendous, although improper, advantage to the prosecution to have in the councils of the defense one of the accused who is nominally standing trial, but with the intention and plan that at a suitable juncture he will change his plea and cast his lot —including all that he knows and all that he has surreptitiously learned—with the Government. Confidential communications between attorney and client would be

nullified, and openings for overreaching and oppression multiplied.

The injustice of the situation is strikingly illustrated by envisioning a contrary state of affairs. Suppose one of the Government agents becomes convinced in the course of his investigation that the indicted defendants are innocent and, in furtherance of what he honestly believes to be right, communicates with their counsel and informs them of the proof which the Government proposed to adduce, pointing out its inadequacy. All concerned, to say the least, would be viewed as engaged in a conspiracy to obstruct justice. If there be anything to the presumption of innocence and the rights of an accused, prosecutors should not be armed with this new weapon which is so palpably susceptible of abuse.

We believe that the motion for a mistrial should have been granted.

QUESTION NO. 4.

(a) Whether the District Judge was right in excluding the testimony of Mrs. Giaimo on the ground that the defense was required to lay a foundation by first interrogating the witness Mandanici regarding his conversations with her, or whether it constituted error.

(b) Whether such refusal deprived the appellants of a defense which, if permitted, would have been supported by ample evidence, or whether it constituted reversible error on the ground that it violated the defendants' constitutional rights to present a theory of their defense.

When Mrs. Josephine Giaimo was offered as a witness for the defendants the District Attorney objected and asked for an offer of proof. After hearing the offer of proof, the Court would not permit the defense to introduce

this testimony on the ground that, except for one statement, it would be irrelevant. This ruling was clearly erroneous.

The offer of proof showed that Mrs. Giaimo would have testified that she was Mandanici's landlady in 1953, during the period when he was supposed to be taking trips to Erie, Pennsylvania, and Buffalo, New York; that Mandanici talked to her about several trips which he was making, but not to Erie or Buffalo; that Mandanici used her telephone to make several calls to Boston, California and other places; and that he once offered her $500. to go to Chicago to pick up "a package" for him. The Court stated that in his opinion this testimony could not be considered "even remotely relevant" and "does not tend to disprove anything testified to by * * * Mandanici."

The Court's ruling deprived the defense of its constitutional right to present vital evidence that would contradict the chief witness for the Government. In evaluating the offer of proof the Court must assume that the proof could have been made. In the language of Judge Learned Hand in *United States vs. Krulewitch,* 145 F. 2d 76, 80 (2nd Circuit 1945), 336 U. S. 440:

> "* * * the competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for truth * * *."

See also *Wigmore on Evidence,* Section 27.

It is the contention of petitioners that it was not necessary to establish first by the cross examination of Mandanici anything pertaining to the proffer that defense counsel made because our witness' testimony constituted a theory of part of our defense which we were entitled to present and which the Court deprived us of this right by denying Mrs. Giaimo the right to testify. Our exception

was duly taken. The Government's position is not a tenable one when it contends that the witness should first be asked if he had a conversation with Mrs. Giaimo or if he ever obtained narcotics from anyone in Chicago.

QUESTION NO. 5.

Whether the Court's refusal to permit the disclosure of witness Mandanici's address was within the Trial Judge's discretion to control the scope and extent of cross-examination, or whether it was a deliberate failure to carry out the mandate of the Supreme Court in an exact situation in the case of Alford vs. United States, 282 U. S. 687, and whether the petitioners' constitutional rights were violated when the Trial Judge denied them the right of cross-examination.

The Trial Court's ruling that the witness Mandanici was not obliged to disclose his address at the time of the trial constituted reversible error.

The testimony of the witness Mandanici occupies some 600 pages of the transcript of testimony. His direct and cross-examination went to great lengths. One of the important features of the inquiry related to the circumstances under which he became a Government witness. More than a year had elapsed between his arrest on October 22, 1953, and the beginning of the trial. It appears that he had been released on bond; on February 12, 1954, he pleaded guilty; he was sentenced to a term of five years; he reached the prison at Milan about February 20, 1954, remaining there for thirty days; he was then taken to Terre Haute, where he stayed until April 25, 1954; thence he was taken to a county jail somewhere in Ohio. Therefore, this latter undisclosed jail was where he had been residing for more than six months before the trial. He was

asked the city where it was located, and his answer was, "I don't want to say where it is, your Honor." He added that he did not want any one to know he was there. The Court sustained him in this refusal, holding:

> "Where he is is of no importance."

The Court held that it had no materiality, and counsel duly took "exception to the Court's ruling that the witness has the right to refuse to answer where he is at present being detained."

Knowledge of the residence of the witness, though it was a certain jail, might well have opened a broad field of interrogation as to the activities and preparation for trial in the preceding half year. In a lengthy trial such as this, counsel might have deemed it expedient and helpful to subpoena the warden or other custodian of the witness, as well as the jail records, to show who had visited the witness and to establish the chain of events leading up to his presence on the stand. The environment of a witness is always a fundamental in the approach to a thorough cross-examination, and the barring of this avenue effectively kept from the jury a mass of information which necessarily bore on the credibility of the witness.

Nor is this a technical or unsubstantial point, for the Supreme Court of the United States has ruled that it is sufficient in and of itself to require a reversal of a conviction. In *Alford vs. United States*, 282 U. S. 687, 75 L. Ed. 624, the witness involved was also in federal custody at the time of the trial, although not yet convicted—which makes the case even stronger than the one at bar. Mr. Justice Stone wrote for the unanimous Court:

> "Upon cross-examination questions seeking to elicit the witness' place of residence were excluded on the government's objection that they were immaterial and not proper cross-examination. * * *

"Cross-examination of a witness is a matter of right * * * Its purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; * * * that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; * * * and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * *

"The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. * * *

"But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution * * * Nor is it material, as the court of

> appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention."

Without quoting further, we desire to point out that the Supreme Court concluded that the Trial Court had cut off at the outset all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. The Court declared that "this was an abuse of discretion and prejudicial error." It was not deemed necessary to pass upon any other point in the case, and the judgment was reversed for that error alone.

QUESTION NO. 6.

Whether the District Court's conflicting and inconsistent instructions to the jury constituted prejudicial and reversible error, and whether such instructions violated the defendants' constitutional rights.

It has been our contention throughout this brief that the District Court was in error when he permitted the reading, question by question and answer by answer, from the statements given to the narcotic agents at a previous time by both Brunello and Artino; also, that the Court erred in permitting the District Attorney to read question after question and answer after answer from the Grand Jury transcript of the testimony of these two witnesses, which was given at a time of about seven months prior to the beginning of this case; all over the objection of counsel. It is our belief that the errors committed by the Trial Court are prejudicial and reversible on the grounds that we alleged above.

We also believe that the errors complained of by permitting the cross-examination for the introduction of the Grand Jury testimony as well as the prior statements into this case could not be cured by a mere instruction to the jury to forget the entire matter because, as we argued, the Grand Jury testimony and the statements which were taken at a previous time and under different conditions were actually used to substitute for the testimony that was being taken before the present petit jury in this case, and that is not the kind of testimony that could be removed from anyone's mind by a mere request or instruction by a judge to do so.

Because of that we feel that in the charge the Court gave he also committed error because the Court distinctly gave two separate and conflicting instructions, one of which was very damaging and prejudicial to this appellant, and these instructions were on the very same Brunello and Artino testimony.

To be specific, the Court told the jury, in substance, that he was reminding them that he had previously instructed them:

> "To disregard all the questions put and the answers given by those witnesses in previous statements or Grand Jury testimony. Those instructions are reaffirmed, and you are instructed that you must remove from your minds entirely any impressions created by reference to such statements or testimony.
>
> "* * * and you will therefore disregard them entirely.
>
> "* * * but it is solely on the slight possibility that there might be some slight impression remaining in your minds about this that I again say to you that it is your duty to eradicate them completely from your minds."

After instructing the jury to entirely forget this part of the testimony and to eradicate anything that might have been left of it from their minds, the Court then takes up the matter himself and instructs the jury as follows:

> "The testimony of the Government agents is not entitled to any greater weight than that of other witnesses simply because they are agents of the Government. But you are to weigh and evaluate their testimony by the same standards that you apply in determining the weight to be given to the testimony of each and all of the other witnesses. But I should say to you that the testimony of the Government agents is not to be given any less weight because witnesses, in an attempt to discredit them, have testified that they used threats and fraudulent and deceptive means to obtain statements from the witnesses, unless you believe that testimony. *You will recall that at least two witnesses, Brunello and Artino, who repudiated their sworn statements before the Grand Jury, so testified; and in weighing the testimony of these witnesses,* and the testimony given in repudiation and denial thereof by the agents, *take into consideration and remember the fact that those who testified against them did repudiate sworn testimony that they gave before the Grand Jury.*" (Emphasis supplied.)

We believe the first instruction did not cure the error that the Court committed but we feel that the latter statement was certainly prejudicial when the Court again calls the attention of the jury and asks them to weigh the testimony of these two witnesses, and in fact, asks them to remember the very testimony he previously instructed them to forget and not to believe the witnesses because they repudiated their former testimony that they gave before the Grand Jury and in their statements, *and the Court did this in spite of the fact that he had asked the jury previously to forget the entire matter and not to permit any portion of it to remain in their minds.*

That instruction certainly brought back to the jurors' minds whatever they wanted to forget, if they could forget it. Those are certainly inconsistent charges, prejudicial to the defendants in this case and particularly to the appellant Poliafico. The jurors certainly could not forget anything of this last instruction even if they wanted to because the Court expressly asked them to remember. He really requested them not to forget, and the words he used were:

> "You will recall * * *
>
> "* * * the testimony given in repudiation and denial thereof by the agents, *take into consideration and remember the fact* that those who testified against them did repudiate sworn testimony that they gave before the Grand Jury." (Emphasis supplied.)

Counsel cannot at this time think of any words that could be considered stronger emphasis than the Court placed in his last instruction where he asked the jury to remember the repudiation by these two witnesses, after naming them, of their previous testimony before the Grand Jury and to remember they said they swore falsely when they gave that testimony. This last charge definitely, in our opinion, is reversible and prejudicial error, if nothing more were added. We took special exception to this part of the Court's charge.

There are several cases we desire to cite in support of our contention.

In the case of *United States vs. Donnelly*, 7th Cir., 179 F. 2d 227, on a similar question where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, it was held reversible error results. This same *Donnelly* case cites the case of *United States vs. Sherman*, 2nd Cir., 171 F. 2d 619, wherein the Court dealt with a situation also similar to the one we have in our

case. In this case the Court admitted a second statement which was consistent with the testimony given at the trial, but which was inconsistent with an earlier statement, and then the Court held such admission was reversible error. In discussing the question of the inconsistency of conflicting instructions on page 233 of the *Donnelly* case, *supra*, the Court says:

> "Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error."
>
> (Citing: *Nicola vs. United States,* 3rd Cir., 72 F. 2d 780; *McFarland vs. United States,* D. C. Cir., 174 F. 2d 538, 539.)

Continuing:

> "A conviction ought not to rest on an equivocal direction to the jury upon a basic issue."
>
> (Citing: *Bollenbach vs. United States,* 326 U. S. 607, 66 S. Ct. 402.)

In the case at bar we are not overlooking the fact that it is our claim the Court could not cure by a mere instruction to the jury to forget all the inadmissible evidence that he permitted it to hear. This the Court did not only do in the one instance of Brunello but also in the second instance of Artino. However, we feel that we ought to set forth in this argument all of the viewpoints of the many Courts who have handled similar situations. We wish to also show herein that even if the Court's first instruction to the jury, to forget all of this testimony that was admitted into the record over objection, were construed as a proper instruction, then the second instruction certainly did considerably more damage. It reminded the jury of the fact that these two witnesses repudiated the testimony theretofore given to the Grand Jury and asked this

jury to therefore weigh their testimony affecting other Government witnesses and to keep in mind and "*remember the fact that those who testified against them did repudiate sworn testimony that they gave before the Grand Jury.*"

To the same effect the case of *Nicola vs. United States*, 72 F. 2d 780, on page 787, holds as follows:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

To the same effect, also, is the holding in the case of *McFarland vs. United States*, 174 F. 2d 539, and *Patterson vs. United States*, 183 F. 2d 687-690.

In one of the very late cases, *Frank vs. United States*, 220 F. 2d 559, 10th Cir., 1955, the Court reversed for the same reasons as cited in the *McFarland* case, *supra*.

We therefore are of the opinion that the conflicting instructions by the Court, as stated above, resulted in prejudicial and reversible error.

QUESTION NO. 7.

Whether the refusal by the District Court to charge as requested in regard to the defendant Poliafico's character evidence constituted prejudicial and reversible error.

The District Court was requested to charge the jury in behalf of Poliafico, as follows:

> "Character evidence has been introduced in behalf of the defendant tending to establish his good character and reputation. The Court therefore charges you that such evidence may in itself be suffi-

cient to create a reasonable doubt in the minds of the jury as to the guilt of the defendant."

The Court, however, did not charge as requested but did charge as follows:

> "The defendant Poliafico has offered evidence here of his good reputation. You will consider this evidence and determine its weight, together with all the other evidence in the case, in arriving at your verdict as to the guilt or innocence of the defendant Poliafico."

To which, exception was taken.

We think the law is plain in a case such as this where practically all of the evidence introduced comes into the case through accomplices, convicts, witnesses who were then imprisoned for other crimes, and generally unreliable persons in every way, that such testimony should not be placed on an even keel and on the same level with testimony of disinterested and respectable witnesses. It is in just such a case as ours that a particular charge of character testimony should be given and it is not sufficient merely to do what the Court did in this case with character evidence.

After all, this appellant has never been convicted of a crime and his word surely is as good or better than the accomplices' testimony that was used against him. Poliafico introduced in his behalf, for character and reputation testimony, several persons both disinterested and respectable, people who have known him for more than ten years, and who testified as to his good reputation for truth, veracity, industry, and to his being a law-abiding citizen. Because of that, the nature of this case, and the kind of witnesses who testified against him, this appellant requested the Court to charge the jury that such character

evidence may in itself be sufficient to create in the minds of the jury a reasonable doubt as to the guilt of the defendant.

We therefore contend that the charge the Court did give, as stated hereinabove, is far from meeting the requested character and reputation charge, also stated above, and the Court's refusal to give the charge as requested constitutes reversible error. In behalf of this contention we beg to cite the case of *United States vs. Donnelly*, 179 F. 2d 227. In this case, also, an accomplice's testimony was relied upon to make the case for the Government and a request on character testimony came in on behalf of the appellant-defendant which was denied by the Court in a similar manner as was done in the case at bar. On page 233 of that case the Court held:

> "The defendant requested the Court to instruct the jury that character evidence may in itself be sufficient to create in the minds of the jury a reasonable doubt as to the guilt of the defendant. The Court refused to so instruct, saying to the jury:
>
> 'That testimony (referring to defendant's reputation), is competent testimony and you may take it into consideration, together with all the other facts and circumstances in the case, and this testimony may be considered by you in reaching your verdict. * * *'
>
> "We think the instruction formally requested by the defendant should have been given. The outcome of the case depended largely upon the jury's appraisal of the credibility of Hendrixson and of the defendant. Under quite similar circumstances in *Snitkin vs. United States*, 265 F. 489, this Court held the failure to give the instruction here requested was reversible error."
>
> (Citing: *Miller vs. United States*, 10th Cir., 120 F. 2, 968.)

In *Edington vs. United States*, 164 U. S. 361, at page 366, the Court said:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevent to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing."

The case of *United States vs. Donnelly, supra*, in our opinion fits our case so perfectly that we desire to quote the last paragraph verbatim and apply it to our case. The Court therein says:

> "The question before us is: What effect did the errors hereinbefore described have, or what effect may they reasonably have had upon the jury's decision? (*Kotteakos vs. U. S.*, 328 U. S. 750-763, 66 S. Ct. 1239.)
>
> "This was a close case, depending largely upon the credibility given to the testimony of an alleged accomplice. In *Berger vs. U. S.*, 295 U. S. 78-89, 55 S. Ct. 629, the Supreme Court characterized the case against Berger for conspiracy as 'weak' depending as it did upon the testimony of Katz, an accomplice. We feel the errors were not harmless (Rule 52, Federal Rules of Criminal Procedure; *Bollenbach vs. United States*, 326 U. S. 607, 66 S. Ct. 402; *Bihn vs. United States*, 328 U. S. 632, 66 S. Ct. 1172), and conclude that their cumulative effect was to prejudice substantial rights of the defendant to the end that the judgment of guilty herein cannot be sustained.
>
> "Reversed and remanded for a new trial."

Our case is in exactly the same situation and position that the *Donnelly* case speaks of. We feel that the same rulings and the same decision should apply to the case at bar.

In addition to the cases cited above, counsel desires to cite the case of *Hayes vs. U. S.*, 227 F. 2d 540, where on page 545 the Court says:

> "In its instruction the Court failed to tell the jury that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence might be convincing."

QUESTION NO. 8.

Whether the constitutional rights of the petitioners were violated by the ruling of the Trial Judge when said Judge denied the petitioners' request for a hearing on the method and manner of the selection of the petit jury, it being claimed that the method of selection was an unconstitutional one.

In the course of empaneling the trial array, counsel for defendant-appellant Pieri made statement and representation to the Court, to the effect that from information then available to such counsel for Pieri, and from an examination of the panel of trial jurors summoned for that purpose, it appeared to be the fact, and that counsel for Pieri believed, that discrimination against and an exclusion of various racial and national groups had occurred, and that it specifically appeared that Negro, Italian and Slavic jury representation on such jury panel did not exist, or that only a token representation of such groups existed.

Counsel for defendant-appellant Pieri thereupon demanded a hearing in connection with the facts relative to the method and manner of selection of the trial array, and demanded a hearing as to similar facts relative to the

method and manner of selection of the Grand Jury which returned the indictment herein.

Counsel for Pieri also stated and represented to the Court, that from information available to such counsel, good grounds appeared to exist so as to believe that the Jury Commissioner appointed in and for the Federal District in question did not function as required by the statutes and rules applicable thereto, but that such Jury Commissioner had unlawfully and wrongfully delegated the duties of such office to the Clerk of the Court, or, in part, to the Marshal of such Court. Counsel for Pieri further stated to the Court that information had been received by such counsel to the effect that the selection of names was one under a "sponsorship" system, which did not in fact result in a reasonably fair representation of the community, or a reasonable cross-section of the community, and that the selection of names, placement of names in a jury wheel, withdrawal of the names from the jury wheel, and control of the mechanics of such selection and placement were not as provided for by statute and rule.

Counsel for Pieri thereupon demanded that the Jury Commissioner be sworn so as to permit an examination of such Jury Commissioner on the various questions raised (jury minutes, A. M. of November 4th).

In reply to such demand of counsel, the Court made answer, "I will not." (Jury minutes, A. M. of November 4th).

Counsel for defendant-appellant Pieri took exception to such ruling of the Court. All defendants joined in the application of defendant-appellant Pieri and joined in the exception to the Court's ruling, except the defendant, Riccobene.

For information of the Court, be it noted that the defendant Pieri is of Italian national extraction, as were most of the defendants on trial. Two of the defendants were of Negro blood, and one defendant of Slavic-Jewish blood.

It is submitted by defendant Pieri that the ruling of the Court was clear error, and substantial error. In *Dow vs. U. S. Steel,* 195 F. 2d 478, 1955 (3 C. A.), the Circuit Court of Appeals remanded to the District Court because of a similar ruling by a trial court. In the *Dow* case, plaintiff's attorney had moved to strike the trial array, on several stated grounds and had moved for a hearing on the issues raised in that connection. The trial Court denied the motion to strike the trial array, and denied the motion for a hearing in connection with such matters, and in review, the Circuit Court of Appeals held that such a question is proper grounds for inquiry on trial, and that any party is entitled to a hearing to attempt to establish the facts of an unconstitutional selection. The Court of Appeals stated, in its opinion, that no Court in review can intelligently pass upon the method and manner of selecting an array if a party be precluded from presenting the facts upon which the claim of unconstitutional selection is based.

The Supreme Court of the United States has held in many instances that this be a substantive question, and has reversed convictions where an unconstitutional method of selection has been shown, or where an exclusion by class has been demonstrated. The Court has further held that it does not matter whether the exclusion is intentional or non-intentional.

Thiel vs. Southern Pacific R. R., 328 U. S. 217;
Smith vs. Texas, 311 U. S. 128;
Fay vs. N. Y., 332 U. S. 261;

Glasser vs. U. S., 315 U. S. 60;
Brinson vs. N. Carolina, 333 U. S. 851;
Norris vs. Alabama, 294 U. S. 587;
U. S. vs. Carolene Prod., 304 U. S. 144;
Piene vs. Louisiana, 306 U. S. 354;
Snowden vs. Hughes, 321 U. S. 1;
Ballard vs. U. S., 329 U. S. 187;
Cassell vs. Texas, 339 U. S. 28.

In *Ballard vs. U. S.*, cited above (1946), a conviction was reversed because women were excluded.

In *Thiel vs. Southern Pacific R. R.*, cited above (1946) a conviction was reversed because daily wage earners were excluded.

In a note made a part of the decision in the *Thiel* case, above, treatment is given as to the classes which may never be excluded, and they are designated as those classes which are cohesive, united by a common interest.

The cases have held in substance that certain classes may never be excluded, to-wit:—women, wage earners, national groups, religious groups, and those having a common political faith.

Appellant Pieri submits that where a reasonable showing, or a reasonable belief, exists that there has been such an exclusion, that a defendant is entitled to raise the issue, and is entitled to produce such proof as may be available, so as to show that such exclusion in fact exists. Appellant submits therefore that he was entitled to an opportunity by hearing to inquire into such matters and that it was clear and substantial error to deny him such right.

QUESTION NO. 9.

Whether motions to dismiss the indictment and a verdict of acquittal in favor of petitioner Pieri should have been granted by the Trial Court on the ground of variance between the proof on trial and the charge in the indictment, and whether such refusal by the District Court constituted reversible error.

The rule applicable to this situation was pronounced by the United States Supreme Court in *Kotteakos vs. U. S.*, 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946), wherein the Supreme Court reversed judgments of conviction against several supposed conspirators who had been jointly indicted under a single general charge of conspiracy. The facts of that case were markedly similar to the facts presented in the instant case:

Kotteakos and thirty-one other defendants were jointly indicted for a single general conspiracy, together with several named co-conspirators. Nineteen of such defendants were tried together. (Here eighteen.)

The case of thirteen defendants was submitted to the jury, the exact number in the instant case.

In *Kotteakos*, it was developed on trial that eight separate conspiracies were established, whereas in the present matter, it is believed not less than five separate conspiracies were established.

In the *Kotteakos* case, no knowledge on the part of one conspirator was shown to have existed as to any other supposed co-conspirators, except that one defendant was common to all conspirators. In this matter, no knowledge on the part of any set of supposed conspirators was shown, as to the existence or activity of any other supposed group of conspirators (suppliers), except that each group of suppliers was supposed to have had knowledge of the

activities of those conspirators composing the Cleveland "core."

The Supreme Court, in reversing the judgments of conviction in *Kotteakos,* used the analogy of the spokes of a wheel all meeting at a common hub (or "core") and found that an indictment charging a single general conspiracy was duplicitous, and was defective thereby, unless some cross-knowledge between the spokes of such wheel existed.

It was urged by appellant Pieri before trial, on motion for severance, and again at the end of the Government's case, again at the end of the entire case, also after verdict, and also in support of a motion for new trial, that such variance existed, that acquittal should be directed, because of the necessary confusion resulting from the proof of all such separate conspiracies, and that substantial error had occurred.

The Government relied upon *Bruno vs. U. S.,* 105 F. 2d 921 (C. A. 2) (1939), which occurred before the decision in *Kotteakos,* upon *U. S. vs. Tramaglino,* 197 F. 2d 928 (C. A. 2) (1952), and upon *Berger vs. U. S.,* 295 U. S. 78 (1935), again before *Kotteakos.* It is significant that the Supreme Court itself distinguished between its decision in *Berger,* cited above, and in *Kotteakos,* stating in substance, that in *Berger* only a few defendants were concerned, and that although variance existed, still denial of motions based thereon, while error, did not constitute substantial error, it not being shown that the jury in *Berger* was necessarily confused.

Both the majority and minority of the Court however, in *Kotteakos,* referred to *Berger,* and considered the applicability of its own doctrine, to-wit: that a case might well come before the Court where, on showing of variance and denial of motions based thereon, such denial might

well be substantial error. The majority and minority differed only on the question in *Kotteakos*, as to whether a point of confusion had been reached, and whether, necessarily, substantial error had occurred, because of the nature of such mass trial.

In *Tramaglino*, cited above, it was proved on trial that all defendants had knowledge of the activities of co-conspirators, and, as a consequence, such case does not come within the application of the rule in *Kotteakos vs. U. S.*

Attention is called to the comment of the majority in *Kotteakos* as to the harm that may result from a loose application of the practice permitting joinder of multiple defendants in conspiracy counts, because of the tremendous difficulty imposed on defendants in mass trials to successfully combat those issues raised solely as to such defendant, but necessarily lost in the confusion of trial.

See also the opinion of the Ninth Circuit Court of Appeals, in *Canella vs. U. S.*, 157 F. 2d 470, where five conspiracies were established, and only twelve defendants were involved. In that instance, convictions were reversed because of the applicability of the rule in *Kotteakos vs. U. S.*

QUESTION NO. 10.

Whether the Court's refusal to enter judgment of acquittal as to Counts 11 and 16 as against Pieri and Poliafico constituted reversible error inasmuch as variance was shown between the charge in the indictment and the proof that was adduced at the trial.

The testimony of the witness Mandanici, an accomplice, clearly established, and such witness conceded, that appellant Pieri participated in no activity in the Northern District of Ohio. Such testimony of such witness further clearly established that the activities of such Pieri

as to conversations, supposed conversations, supposed dealings and supposed activities, all occurred in the City of Buffalo, New York, or in the City of Erie, Pennsylvania.

As stated heretofore, the Government conceded at the end of the Government case that the substantive charges as to appellant Pieri might be dismissed; sale Counts 10 and 15 were dismissed; Counts 11 and 16 on transportation, concealment or facilitation were submitted to the jury.

The basis of the Court's ruling, to which exception was taken, was to the effect that since possession at one time was found to be in appellant Pieri, that such possession was sufficient to carry over in a continuing or constructive sense, and that the presumption stemming from possession, arising from Section 174, Title 21, U. S. C., carried with it a presumption of venue. Even if the Court's ruling on this point was correct, it is submitted that any presumption of venue was destroyed by the actual proof adduced on trial, under the doctrine of *Casey vs. U. S.*, 276 U. S. 413, 48 S. Ct. 373, 72 L. Ed. 632.

The attention of the Court is called to those matters relating to double punishment treated in the brief submitted on behalf of appellant Poliafico.

The attention of the Court is also directed to *Wrightson vs. U. S.*, 222 F. 2d 556, to the effect that an abundance of evidence is not sufficient to warrant an affirmance if substantial error be shown, but that a reversal must be directed, even though guilt seems clear.

Appellant Pieri vigorously contends innocence, and does not concede guilt, but urges that even though guilt were clearly shown, substantial error has been shown and that an acquittal must be directed.

QUESTION NO. 11.

Whether there was competent proof that the substance alleged to have been sold by petitioner Crisci was heroin.

The testimony of Frank Consolo showed that Riccobene was carrying a cigar box containing half a kilogram of "white powder" wrapped in a cellophane package, and that when he got to Consolo's apartment he showed him and the petitioner Crisci how to cut the powder. Consolo referred to the substance as heroin. There was no evidence, however, that it was in fact heroin or any form of narcotic. A conviction cannot be sustained in the absence of such proof.

It was again testified by Mandanici that while he and Poliafico drove along highway 422 they saw a car bearing petitioners Crisci and Naselli coming from the opposite direction. That Poliafico got out and talked with Crisci and Naselli and later came back and handed Mandanici a package which Mandanici stated was heroin, and that he sold this half a kilogram to one Steve Simmons. Aside from this reference to the package as heroin, there is no proof whatsoever as to the contents of the package.

Proof of possession of unstamped narcotics gives rise to a presumption of guilt of the substantive offenses of transporting and selling, prohibited by 21 U. S. C. 174 and 26 U. S. C. 2553(a); *McDade vs. United States*, 206 F. 2d 494 (6 Cir. 1953); *Copperthwaite vs. United States*, 37 F. 2d 846 (6 Cir. 1930). However, there must be actual proof that the substance in the defendant's possession consists of a narcotic drug. That proof constitutes the corpus delicti of the offense; *United States vs. Tramaglino*, 197 F. 2d 928; *United States vs. Stallsworth*, 193 F. 2d 870, 873.

Likewise, in a prosecution for conspiracy to commit an offense against the narcotic laws there must also be independent proof that the "stuff" dealt with does in fact consist of narcotics. It is clear that there can be no conviction for conspiracy unless the object of the conspiracy is in itself illegal: *Gebardi vs. United States,* 287 U. S. 112 (1952); *Fulbright vs. United States,* 91 F. 2d 210 (7 Cir. 1937). Thus there can be no conspiracy to violate the narcotic laws without actual proof of the existence of narcotics. And evidence of narcotics is part of the proof offered by the Government in every case. See e.g.: *United States vs. Pisano,* 193 F. 2d 355 (7 Cir. 1951); *United States vs. Cohen,* 124 F. 2d 164 (2 Cir. 1941); *United States vs. Adelman,* 107 F. 2d 497 (2 Cir. 1939). *Cf. Grabenheaimer vs. United States,* 194 F. 2d 447 (6 Cir. 1952).

QUESTION NO. 12.

Whether there was error in the Court's refusal to correctly charge the jury on the effect of the defendant Crisci's failure to testify.

Counsel for Crisci requested the Court to charge that the failure of a defendant to take the witness stand "does not create any presumption against him." The Court stated that this charge "will be given in substance" and charged the jury as follows:

> "* * * you are not permitted under the law to draw any inference of guilt because of the fact that any of these defendants failed to testify in his own behalf."

It is submitted that the charge was erroneous. The Criminal Code provides expressly that the failure of a defendant to testify "shall not create any presumption against him"; 18 U. S. C. Sec. 3481. The defendant Crisci

was entitled to a charge in the language of the statute. An "inference of guilt," is more restricted than "any presumption against him"; *Morgan, Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906 (1931); *Wigmore*, Sec. 2490-2540.

In *Bruno vs. United States*, 308 U. S. 287 (1939), the Supreme Court, speaking through Mr. Justice Frankfurter, held that a defendant is entitled to a charge in the exact language of the statute, stating:

> "Concededly the charge requested by Bruno was correct. The Act of March 16, 1878 (now 18 U. S. C. 3481) gave him the right to invoke it."

The Court further stated that the failure to acknowledge "the right of an accused to insist on a privilege which Congress has given him" is not a mere "technical error." See also *Bollenbach vs. United States*, 326 U. S. 607 (1946), in which Mr. Justice Frankfurter stated: "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

QUESTION NO. 13.

Whether the Trial Court erred in curtailing the cross-examination of the witness Mandanici on the supposed basis of privilege attaching to a prior attorney and client relationship.

We submit that two independent errors were committed in this connection.

Mr. Redmond, attorney for defendant Boda, had at one time been attorney for Mandanici. Of course, we recognize that in consequence thereof Mandanici could not, without his own waiver or consent, have been interrogated concerning any confidential communications to Mr. Redmond or Mr. Redmond's advice thereon. However, this

was not the subject-matter of the proposed inquiry, for Mr. Redmond propounded the following query:

> "Did you ever tell your friends that lived in your neighborhood that you were not the one that left two ounces of narcotics under a mail box?"

This was quite patently a question being asked as a foundation for the impeachment of the witness, and certainly there was nothing to show that Mr. Redmond had derived information relating to its subject-matter from Mandanici himself. A colloquy ensued between Mr. Redmond and the Court wherein the attorney assured the Court that the statement was not made in Mr. Redmond's presence but emanated from other persons; it further appeared that the alleged statement had been made at the time when Mr. Redmond was representing Mandanici. That appeared to conclude the matter, for the Court thereupon sustained objection thereto. We submit that where a lawyer representing a client learns during the period of representation that the client made certain statements to others, the lawyer deriving the information from a source other than the client, and the lawyer ceases to represent that client, the lawyer may properly, in defense of a different client, use that information even though the effect be to impeach the former client. There is nothing in the confidential relationship which bars such evidence, and the privilege may not be so extended. Any such rule would be completely outside the well-understood scope of privilege, and would needlessly circumscribe a lawyer in the defense of the client whom he ultimately represents.

Nothing is better established with regard to the privilege attending communications between attorney and client than that the privilege is that of the client, who is free to waive it whenever he sees fit. For the purposes of

the present argument, let it be assumed—though, frankly, we are unable to perceive how it can be brought within the ambit of privilege—that Mr. Redmond's line of interrogation was such as to be presumptively prohibited by virtue of his former representation of Mandanici. It would still follow that Mandanici was quite free to waive his rights in the premises and testify on the subject if what he was called on to say was otherwise competent. Nevertheless, Mr. Meltzer, counsel for Lazzaro, proposed this question in the course of cross-examination:

> "I want to ask him whether he at this time is willing to waive the privilege so that he can relate to us what the conversation was."

The Court suggested that the question be objected to, and then proceeded emphatically to sustain the objection. The result was that the defense was held not entitled even to ascertain whether Mandanici would be willing to waive the privilege. Therefore, even on the basis of the existence of possible privilege, which the former client surely was permitted to forego, the defense was precluded *in limine* from determining whether the doubtful veil might be lifted.

CONCLUSION.

In view of the numerous instances of probable prejudicial and reversible errors, as set forth herein, some of which involve constitutional questions, it was not possible to have a fair trial and for the other reasons discussed in this Petition for Certiorari, it is respectfully submitted that this petition should be granted.

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Attorney for Sylvester Poliafico and Anthony Naselli.

JACOB W. FRIEDMAN,

Attorney for Salvatore Lazzaro and Nunzio Romano.

FRANK E. STEEL,

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GEORGE J. TODARO,

Attorney for Anthony Crisci.

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Attorneys for Salvatore Pieri and Michael Erra.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (Appeal Nos. 12476 to 12484, incl.).

August 31, 1956.

Before SIMONS, Chief Judge, and ALLEN and McALLISTER, Circuit Judges.

McALLISTER, Circuit Judge.

All of the appellants were indicted for conspiracy to violate the narcotic laws,[1] and a number of them were also charged with various substantive offenses involving violations of the same laws. The conspiracy was, as claimed by the government, widespread and long continued, involving many persons. Eighteen of the twenty defendants actually went to trial. An order of severance was made as to one defendant, because of his illness; one pleaded guilty before trial; the district court dismissed the case against another; and the jury found one defendant not guilty. The remaining defendants, including all of the appellants, were found guilty of conspiracy. Four of the appellants were also found guilty of the substantive offenses charged.

On their nine separate appeals, the convicted defendants raise numerous claims of error. They contend that the evidence was insufficient to sustain the convictions; that the trial court erred in both admitting and excluding testimony and in its instructions to the jury; that the grand and petit juries were improperly constituted; that there were improper venue as to certain of the defendants; and that the closing argument of the district attorney was prejudicial and constituted reversible error.

The primary contention of the majority of the appellants is that, while the government charged a single con-

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[1] Title 21 U. S. C. A. § 174; Title 26 U. S. C. §§ 2553(a) and 2554(a); and Title 18 U. S. C. § 2(a).

spiracy, its evidence only purported to disclose, instead, a number of different conspiracies; that the parties alleged to be in one of the conspiracies were not proved to be in the other conspiracies; and that, accordingly, there was a fatal variance between the indictment and the proof. The foregoing claim requires some consideration of the relationship between the appellants, as well as the acts claimed to have been committed by them.

James Mandanici, named as one of the co-conspirators in the indictment, and Frank Consolo, who pleaded guilty to the conspiracy count, were two of the chief witnesses for the government. According to their evidence, appellant Poliafico was the organizer and ringleader of the conspiracy which had its principal base of operations in Cleveland, Ohio. It was Poliafico who first solicited Mandanici, and Consolo, both government witnesses, as above mentioned, to distribute the narcotics—which were to be delivered to him at a later date—at a salary of $100 a week; and it was through the negotiations of Poliafico that appellants Riccobene and Crisci came to Cleveland from New York City, bringing the first half kilo of pure heroin which Riccobene carried in a cigar box. Upon his arrival, Riccobene explained to Poliafico and Consolo that they needed a scale, cellophane bags, and milk sugar in order to mix, weigh, and package the heroin, and told them that he wanted to show the others how to mix it. When the required articles were procured by Crisci and Poliafico, Riccobene dumped the half kilo of heroin on a table and mixed it with the milk sugar, and Poliafico and Crisci weighed it and poured it into one-ounce packages.

After they were through mixing the heroin, Riccobene discussed with Poliafico, Crisci, and Consolo the cost of the first half kilo of heroin, and the fact that it was on consignment; and the agreement that after it had been sold to

addicts, and paid for, they would receive the second half kilo. The heroin in question was subsequently distributed and sold, in a mixture with milk sugar, or quinine, in one-ounce packages. The first half kilo was thereafter paid for by Poliafico and his associates, and further shipments of heroin continued to be delivered to them by various of the alleged co-conspirators, and sold in the small ounce packages to individual drug addicts. Money collected from the sales was paid to Crisci. On a subsequent occasion, Crisci mixed up the remainder of the heroin, when the supply was getting low. Thereafter, on several occasions, Crisci came to Cleveland to collect money in payment for heroin from the Poliafico group.

Evidence introduced on behalf of the government, in addition to the proofs concerning the activities of appellants Poliafico, Riccobene, and Crisci, and the government witnesses Mandanici and Consolo, shows that appellant Naselli, pursuant to arrangements with Crisci and subsequent to the initial delivery by Riccobene, brought heroin from New York and delivered it to Poliafico and Mandanici at a point on the outskirts of Cleveland; and that Naselli made collection of payments for the heroin at various times when he made other deliveries.

The government's proofs further show that appellant Erra carried on successful negotiations in New York to secure additional heroin for Poliafico and his associates in Cleveland, and made arrangements for the delivery of the narcotics that were afterward carried out; that appellant Yoslovitz, on one occasion, was present at the "Spanish Village" with Erra and Mandanici, when Poliafico stated that he had some heroin at Yoslovitz's apartment, and that they were all going over to pick it up; and that Yoslovitz then went to his apartment with Poliafico, Erra, and Mandanici, and there procured a half kilo of heroin, which

he delivered to Mandanici and which he had previously secured from New York. Erra was living in the same apartment with Yoslovitz. Yoslovitz later accompanied Poliafico and Mandanici to Pennsylvania where they met appellant Pieri, from Buffalo, for the purpose of making arrangements to secure heroin from him. Pieri told them that he would let them know in a few days about the matter, and afterward delivered ten ounces of heroin to Poliafico and Mandanici.

As to appellant Lazzaro, the evidence of the government showed that pursuant to arrangements made in New York by Poliafico, who told Mandanici that more heroin would be brought to Cleveland in a day or two by a man name Lazzaro, Lazzaro came to Cleveland with a half kilo of heroin which he delivered to Mandanici who was acting for Poliafico in the matter. As to appellant Romano, Mandanici testified that the half kilo of heroin delivered by Yoslovitz came from Romano in New York. It appeared from the proofs that Poliafico had introduced Mandanici to Romano, informing him that Romano had come to Cleveland to collect the money for the half kilo of heroin; that when Poliafico and Mandanici had first met appellant Erra, he informed them that Romano was his partner, and, thereafter, would let Poliafico know in advance whenever Romano was going to come to Cleveland. After several of their transactions in heroin, Poliafico and Mandanici met Erra and Romano in New York and discussed certain indictments for violation of the narcotic laws that had been returned in Cleveland against other parties, not involved in this case. Poliafico and Mandanici told them not to expect money so fast in payment for the heroin, as they were going to "lay dead" for awhile because of the indictments that had just been announced in the newspapers; and that, in reply, Romano and Erra had said: "All right."

Were the appellants engaged in the same conspiracy? Poliafico was the man who organized and promoted the enterprise of buying heroin in large, unadulterated quantities and reselling it, at a profit, in small, adulterated quantities. He and certain appellants carried on negotiations for the purchase of heroin from other appellants, and bought it from them. He arranged with other appellants to adulterate the heroin so purchased and to sell it to drug addicts. All of the appellants were either selling heroin to Poliafico and his associates, or reselling it for them, or carrying on negotiations for such sales, or making payments therefor, or delivering heroin for resale, or reselling it. The purchase of heroin and the resale of heroin, in this case, was concerned with one enterprise, which could be called the Poliafico deal, in the parlance of the underworld. The over-all conspiracy was the plan, conceived by Poliafico and his associates, to buy and sell heroin at a profit. The suppliers knew that the purchases were for resale and they also knew that several conspirators were involved in the purchases. The fact that one such supplier did not have dealings with another supplier does not matter. If each performs the same role at successive stages for the same ends, and both know and participate in the plan of the others to buy and sell heroin at a profit, each is guilty as a conspirator. *United States v. Tramaglino*, 197 F. (2d) 928 (C. A. 2). When two or more persons are shown to have been engaged in the same unlawful conspiracy, having for its object the same common and unlawful purpose, it is not necessary to prove the knowledge by one of the dealings, or even of the existence, of the others, in order to render evidence of the actions of those others admissible against that person. There was one conspiracy in this case—the continuing scheme of buying and reselling heroin. The proofs of the government

show that all appellants were associated in this scheme, some by virtue of selling or delivering the heroin to the Poliafico group, others because of being associated with the group in carrying out the scheme, collecting money through resales of the drug, making payments to suppliers, or carrying on negotiations for the purchase or resale. All appellants knew of the conspiracy. The suppliers knew that the Poliafico group must resell the heroin at a profit; and all associated with Poliafico in the resale of the heroin knew that Poliafico must buy it from suppliers and that the resales must be at a profit. "One who commits an overt act with knowledge of the conspiracy is guilty, even though he is absent when the crime, which is the object of the conspiracy, is committed. Such person's knowledge as to the scope of the conspiracy, may be limited, and he need not know all the details of the plan or the operations. Knowledge of membership in the conspiracy, the part played by each of the members, and the division of spoils is immaterial. He must know the purpose of the conspiracy, however, otherwise he is not guilty." *Marino v. United States,* 91 F. (2d) 691, 696 (C. C. A. 9). The addition of new members to a conspiracy or the withdrawal of old ones from it does not change the status of the other conspirators. Nor is it necessary to prove that a conspirator engaged directly in the buying or selling of narcotics or received a profit therefrom. *United States v. Cohen,* 197 F. (2d) 26 (C. A. 3). A conspiracy is complete on the forming of the criminal agreement and the performance of an overt act in furtherance thereof. *Singer v. United States,* 208 F. (2d) 477 (C. A. 6); *Pinkerton v. United States,* 151 F. (2d) 499 (C. C. A. 5). Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it. *United States v. Cohen, supra.* "The jury having found

guilt, slight evidence connecting a defendant with a conspiracy may be substantial and, if it is, is sufficient." *Meyers v. United States*, 94 F. (2d) 433, 434 (C. C. A. 6).

The conspiracy in this case was complete, according to the government's proofs, on January 10, 1952, when Poliafico, Crisci, Riccobene, and Consolo met to receive the heroin which Riccobene had brought to Cleveland from New York, and after a discussion of the methods of adulteration and sale of the narcotics, obtained scales, bags, and milk sugar, adulterated the pure heroin, weighed it, and put it into ounce packages, for the purpose of sale to their first customers.

A conspirator may join at any point in the progress of the conspiracy and be held responsible for all that may be or has been done; *Braverman v. United States*, 125 F. (2d) 283, 286 (C. C. A. 6), (reversed on other grounds 317 U. S. 49); *United States v. McKee*, 220 F. (2d) 266 (C. A. 2); and the foregoing applies to those appellants who did not participate in the formation of the conspiracy, but joined it at various times thereafter, for the evidence discloses that, as the conspiracy enlarged and progressed through its various stages, new members joined it. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and a collocation of circumstances. *Glasser v. United States*, 315 U. S. 60, 80. There was substantial evidence to connect all of the appellants with the conspiracy.

Kotteakos v. United States, 328 U. S. 750, is relied upon by appellants as showing that the instant case involved several different conspiracies, instead of one, whereas appellants were charged with only one conspiracy, and that there was, therefore, a fatal variance between the indictment and the proofs. In the *Kotteakos* case, the evi-

dence disclosed eight or more conspiracies by separate groups of defendants which had no connection with each other except that they utilized one Brown as a broker to handle fraudulent applications for loans. In *Blumenthal v. United States*, 332 U. S. 539, 558, the court, in distinguishing the *Kotteakos* case involving several conspiracies from a case involving one conspiracy, said:

> "Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan.
>
> "Here the contrary is true. All knew of and joined in the overriding scheme."

On the same grounds, the *Kotteakos* case is, likewise, distinguishable from the instant case.

Riccobene contends that there is no proof that he was guilty of conspiracy. He claims there is no evidence that the substance adulterated by him at the first meeting with Poliafico, Consolo, and Crisci was actually heroin; that, in

any event, his only connection with the appellants was the single delivery which he made; that he never saw any of the appellants thereafter; and that his connection with the affair ended with this one meeting and delivery. He, therefore, submits that there was no proof that he was knowingly associated in the unlawful common enterprise to import the narcotic and dispose of it unlawfully, as charged in the indictment. As to the nature of the substance which Riccobene delivered, it was not necessary for the government to prove that it was heroin, for he was not convicted of the substantive offense of selling or delivering heroin, but of conspiracy; and conspiracy is a crime in and of itself, separate and apart from the crime of importation, purchase, sale, and transportation of narcotics. *Braverman v. United States,* 317 U. S. 49; *Pereira v. United States,* 347 U. S. 1; *Pinkerton v. United States,* 328 U. S. 640. As heretofore stated, the crime of conspiracy is complete upon the formation of the illegal agreement and the commission of an overt act pursuant thereto; and the overt act need not constitute a crime. *Braverman v. United States, supra.* Here, the conspiracy was to violate the narcotic laws; and when the parties agreed to this and took the steps to carry it out, the offense was complete even without proof that the substance delivered was heroin. Poliafico, Consolo, Crisci, and Riccobene assumed it to be heroin; they spoke of it as heroin; they adulterated it and made samples for customers; the first delivery of the half kilo cost $8,000; they sold it as heroin; and received from $100 to $200 an ounce for it.

"No formal agreement is necessary to constitute an unlawful conspiracy. Almost always, the crime is a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an

> apparent criminal purpose. *Stack et al. v. United States,* 9 Cir., 27 F. (2d) 16; *Pearlman v. United States,* 9 Cir., 20 F. (2d) 113. The agreement may be shown by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose. *Marino v. United States,* 9 Cir., 91 F. (2d) 691, 113 A. L. R. 975. It is the common design which is the essence of the conspiracy or combination; and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but always leading to the same unlawful result. *United States v. Harrison,* 3 Cir., 121 F. (2d) 930; *Allen v. United States,* 7 Cir., 4 F. (2d) 688. Often, if not generally, direct proof of a criminal conspiracy is not available, and the common purpose and plan are disclosed only by a development and collocation of circumstances." *American Tobacco Co. et al. v. United States,* 147 F. (2d) 93, 107 (C. C. A. 6).

It was not necessary for the government to prove that the substance delivered by Riccobene was heroin in order to convict him of a conspiracy to violate the narcotic laws.

As to the contention that Riccobene's single delivery of heroin to the Poliafico group on January 10, 1952, ended his connection with them and, therefore, did not sustain the charge against him of conspiracy, it is true that he told them that he was leaving Cleveland that night to stand trial in the East. It appears, too, that five days later, on January 15, 1952, he was sentenced to prison in Philadelphia. It is contended that when, as admitted, Riccobene told the others that he would show them how to mix the heroin so that he would not have to come back to Cleveland, such a statement indicated that he, and the others, knew that he would be in prison in the future—

"out of circulation," as his attorney put it—and that this was proof that his connection with the enterprise ended when he delivered the heroin, mixed it, and returned to the East. But this does not follow. Riccobene never affirmatively withdrew from the conspiracy, and affirmative action is required to show withdrawal, for a conspiracy, once established, is presumed to continue until the contrary is established. *Hyde vs. United States*, 225 U. S. 347; *Marino v. United States*, 91 F. (2d) 691 (C. C. A. 9). Riccobene told Poliafico and his associates that when they paid for this first half kilo that he had delivered to them "on consignment," they could receive another half kilo. This would indicate that he was engaged in a continuing scheme of supplying heroin to them. His telling them that he would show them how to mix and cut the heroin so that "in that way, he does not have to come into town" might, with reason, be interpreted to the effect that the operation would be repeated, in the future, and that, by showing them how to mix the heroin for resale, Riccobene would not have to return each time a new delivery was made. Moreover, there was evidence that the profits of the first half kilo sold were to be split equally among the four—Poliafico, Mandanici, Crisci, and Riccobene. *Pinkerton v. United States*, 328 U. S. 640, sustained the conviction of a defendant for a substantive offense committed by a fellow conspirator while the defendant was in the penitentiary and had no knowledge of the crime. There was substantial proof to sustain Riccobene's conviction for conspiracy.

Appellant Riccobene asked the court to charge the jury that before one could be a conspirator, it must be shown that he had a stake in the enterprise. The court did charge to this effect, and added that if a person, knowing

about a conspiracy and with intent to join it, committed a violation of law in furtherance thereof, that would be evidence of a stake in the conspiracy. Both Riccobene and Erra complain of this instruction, although neither took exception to it, as required by Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. It was not necessary to show a financial interest in the conspiracy. The interest may be that of seeking, by action, to make the venture succeed. See *United States v. Peoni*, 100 F. (2d) 401 (C. C. A. 2); *Morei v. United States*, 127 F. (2d) 827 (C. C. A. 6). The stake is in the success of the enterprise. *United States v. Di Re*, 159 F. (2d) 818 (C. C. A. 2).

Riccobene and several of the other appellants contend that the trial court was in error when it sustained objections to certain questions asked Consolo and Mandanici on cross examination. It will be remembered that Consolo was a government witness and not on trial as a defendant, as he had already pleaded guilty. One of the questions asked Consolo was whether a burglary he committed in 1937 was the first time he had committed a burglary, or whether it was only the first time he had been caught and sentenced for that crime. He was also asked to explain the circumstances when he was arrested for having a revolver in his possession. The trial court sustained objections to these questions. As going to the credibility of the witness, Consolo, these questions, under certain circumstances, might have been proper, and the ruling of the court in sustaining objections thereto might have resulted in prejudicial error, but not in this case. For it appeared from Consolo's prior testimony in the case that he had been previously convicted of burglary; that at another time, he had been convicted of violation of the fire arms law; that he had been convicted of violation of the Dyer Act,

18 U. S. C. A. §§ 10, 2311-2313, for transporting a stolen automobile across state lines; and he had pleaded guilty to the heroin conspiracy in the instant case. It also appeared that he had served a year and a day on the fire arms conviction, and had been serving a five-year term on the Dyer Act charge, first, in Alcatraz, and afterward, in Leavenworth Penitentiary. He had also previously been guilty of a jail break when held for one of the offenses. As far as criminal conduct went, the jury knew from the foregoing what Consolo's record was, and, in addition, knew that he was one of the ringleaders in the heroin conspiracy, to which he had pleaded guilty and for which, at that time, he was serving a sentence in the penitentiary. It would not have added, substantially, to his criminal record or further affected his credibility to proceed to investigate further the circumstances with respect to his having a revolver in violation of law—for which he had been convicted and served a sentence—or to pursue an inquiry into whether he had been engaged in other burglaries for which he had not been convicted prior to the burglary for which he had been convicted. The trial court acted with discretion to keep the examination of witnesses within some bounds as to time and substance; and its rulings did not result in prejudicial error.

As to Mandanici, his cross examination, as stated by government counsel, occupies more than 400 pages of the transcript. He had pleaded guilty to the conspiracy of violating the narcotics law in the instant case. On cross examination, Mandanici had testified that he had been sentenced to serve a five-year term and had been taken to Milan Penitentiary on this sentence; that thereafter he was transferred to Terre Haute; and afterward, brought to a county jail where he was confined at the time of his tes-

timony. He was then asked whether that jail was located in or near Cleveland, and the trial court sustained an objection to this question. However, on subsequent cross examination, Mandanici disclosed that the jail in question was located at Elyria. What appellants wanted was information about the jail where Mandanici was held, and this subsequent cross examination elicited that fact. There could, therefore, be no prejudice to appellants from the court's prior ruling. Nor was it prejudicial error to sustain objection to the question addressed to Mandanici as to whether he would lie to gain his liberty and in order to keep his family from being sent to jail for narcotic violations. There was no evidence that the members of Mandanici's family were engaged in narcotic activities—unless it was his brother-in-law, Consolo, who had already pleaded guilty—and Mandanici himself was already serving a sentence of five years on his plea of guilty. It was not improper for the trial court to sustain objections to the questions as to whether the testimony of another witness was correct; as to what Consolo had said during the trial of another case unrelated to the instant case with regard to the veracity of government witnesses; as to where Consolo's wife had secured money to buy her automobile; and the reasons why he himself gave up his job to sell narcotics. We have reviewed numerous other complaints with respect to the court's rulings sustaining objections to questions asked during the cross examination of Consolo and Mandanici and find that none could be said to result in prejudicial error.

During the cross examination of Mandanici, it appeared that he had made three written statements to the federal narcotic agents prior to the trial. The first statement was given to appellants' counsel during his cross

examination. The government declined to give the other two statements to counsel upon their asking for them, and the trial court, upon the request of appellants' counsel for a ruling on their demand to see the statements, ruled that the demand was refused. Later, however, the statements were voluntarily, during the trial, turned over to appellants' counsel and the court assured them that they could call Mandanici for further cross examination with respect to them, and the government counsel stated the witness would be available if appellants' attorneys desired to recall him. Counsel for appellants later used these statements in cross examining another witness, and, in lieu of recalling Mandanici, entered into a stipulation as to what he would testify that was contradictory of Consolo, to the effect that he would say that the latter told him that it was Crisci who showed how the heroin should be mixed at their first meeting. Consolo had testified that Riccobene was the man who had showed them how to mix the heroin with milk sugar. As appellants did not avail themselves of this full opportunity given by government counsel and the court of cross examining Mandanici on all of the written statements he had made prior to trial to the federal agents, they have no basis to claim prejudicial error on the ground that the court, prior to that time, had been of a contrary opinion. They cannot now be heard to complain, since they did, in fact, receive Mandanici's pre-trial statements; they had an opportunity to cross examine him as to those statements; and they brought the inconsistencies contained therein to the attention of the jury.

Appellants claim that it was error on the part of the court to permit the government attorney to cross examine two government witnesses on their contradictory grand

jury testimony, after they had turned hostile, and the government had been taken by surprise. The prior testimony, which was read to the witnesses, was for the purpose of refreshing their memory, and did, in fact, refresh their memory in a number of instances. The trial court clearly and thoroughly explained to the jury that such cross examination was permitted only to refresh the witnesses' recollection, and that the questions and answers read to them were not evidence to be considered by the jury in the case.

> "When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness." *Hickory v. United States,* 151 U. S. 303, 309.

In *Di Carlo v. United States,* 6 F. (2d) 364, 368 (C. C. A. 2), the court said:

> "The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. Nothing is more unfair than to confine a party under such circumstances to neutral questions. Not only may the questions extend to cross-examination, but, if necessary to bring out the truth, it is entirely proper to inquire of such a witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times. * * * The possibility that the jury may accept as the truth the earlier statements in

preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."

In *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 233, the Supreme Court said, in a similar case:

> "As in case of leading questions, * * * such use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. See *Di Carlo v. United States,* 6 F. (2d) 364, 367-368; *Bosselman v. United States,* 239 F. 82, 85; *Felder v. United States,* 9 F. (2d) 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection."

We find no error in the rulings of the trial court on the cross examination of these hostile witnesses or in its instructions to the jury with regard to their testimony that they had been threatened and intimidated by the government officials prior to their testimony before the grand jury.

During the impanelling of the petit jury, counsel for appellants, for the first time, challenged the selection of the grand jury and the petit jury on the ground, as he stated, "that a review of the panel itself discloses a probability of the exclusion of nationality groups and race

groups, from an examination of the names themselves and from the persons who have been examined here before, as of yesterday, and from the fact that some of the jurors have had jury service within just a few months before this." In answer to the trial court's question addressed to him, counsel admitted that he was not in a position to say that the selection of the juries had not been made in accordance with the statute. Counsel had no knowledge as to how the juries were selected. He was under the impression that there was no jury commissioner, until informed by the court that there was, and that such jury commissioner had functioned in the selection of the jurors. Counsel had not examined the statute on the subject; and he actually voiced nothing more than a suspicion that the jurors were not selected in accordance with law. The names of all of the jurors who had been summoned had been available for at least two weeks for anyone who desired to secure them at the office of the clerk. When appellants' counsel found that there was actually a jury commissioner in existence, he asked that she be brought from her home two hundred miles away in order that he could conduct an examination of her methods in selecting jurors. All of this occurred after the better part of a day had been consumed in attempting to select a jury.

The challenges to the selection of the juries were not specific; they did not set forth distinctly any grounds relied upon; they did not purport to rely upon any facts; they embodied merely the opinions and conclusions of counsel; no affidavits were filed, and no evidence was introduced to support any irregularities; it was not alleged that the method of selection of the jurors did not comply with the law.

In keeping with the provisions of Rule 12 of the Federal Rules of Criminal Procedure, a motion challenging the method of impanelling a grand jury must be made before the plea is entered except in instances where the court permits it to be made within a "reasonable" time thereafter. Failure to raise the objection within the prescribed time constitutes a waiver. See Notes of Advisory Committee on Rules, Federal Rules of Criminal Procedure, rule 12 note, 18 U. S. C. A., pages 205, 206. *Agnew v. United States*, 165 U. S. 36; *Wright v. United States*, 165 F. (2d) 405, 407 (C. C. A. 8); *Carruthers v. Reed*, 102 F. (2d) 933, 939 (C. C. A. 8).

In the absence of evidence to the contrary, it will be presumed that the officers charged with selecting a jury have acted according to law. A challenge to the array must be supported by evidence. Under the foregoing circumstances, it was not error on the part of the trial court, during the examination of the jury, to refuse to summon the jury commissioner to come from her home two hundred miles distant to submit to examination by appellants' counsel on the possibility that something might turn up to strengthen a suspicion.

Error is claimed because of the action of the trial court in asking Mandanici whether he would waive the privilege of certain confidential communications and, upon his refusal to do so, in excluding testimony concerning such communications. It appeared that one of the counsel for appellants had previously represented Mandanici as his lawyer when he was charged with violating the narcotic laws. On the cross examination of Mandanici, his former lawyer asked him various questions with regard to facts and information that had come to the lawyer's attention respecting Mandanici's violations of the

narcotic laws. The court committed no prejudicial misconduct and was not in error in advising Mandanici of the fact that the communications and information received by the lawyer while acting in his capacity as Mandanici's attorney were privileged; that he did not need to waive the privilege; and in excluding such testimony on Mandanici's refusal to waive his rights. The information was privileged. It could only be waived by Mandanici. *Robinson v. United States,* 144 F. (2d) 392 (C. C. A. 6).

Certain of appellants' counsel complained that they were not permitted to ascertain whether Mandanici would waive the privilege after he had claimed it. They submit in their briefs that they "proposed" the question in the following statement to the court:

> "I want to ask him whether he at this time is willing to waive the privilege so that he can relate to us what the conversation was."

Counsel declare that the trial court then suggested that the question be objected to, and thereupon, proceeded to sustain the objection. None of the foregoing appears in the printed appendices of appellants which were filed, aggregating more than 600 pages, and containing the record references; nor were any typewritten copies of unprinted portions of the record thereafter filed, as is permitted by Rule 16(6) of the Rules of this Court. It is provided that the appendices filed by the parties contain such parts of the record as counsel deem it essential for the judges of the court to read in order to decide the questions involved. Paragraphs (2) (e) and (4) (e) of Rule 16 of the Rules of this Court. In any event, even if the question were asked of the witness (which it was not) and the court had sustained an objection to it, such action would not result in reversible error. The witness had already declared

that he would not waive the privilege; there was nothing to indicate that he had changed his mind; and, since limitations on cross examination rest within the discretion of the court, it would be necessary to show an abuse of that discretion in order to establish the claimed prejudicial error. No such abuse of discretion was shown. In a similar instance involving the claim that the trial court was guilty of abuse of discretion in unduly limiting a cross examination, the Supreme Court observed: "We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser v. United States*, 315 U. S. 60, 83.

It is claimed that while the conversations which Mandanici had with his counsel may have been privileged, information which had come to such counsel from third parties was not so privileged, and the court was, therefore, in error in rejecting testimony concerning it, and in refusing to permit Mandanici to be cross examined with respect thereto.

One of the questions which Mandanici's former attorney asked him was the following:

> "Did you ever tell your friends that lived in your neighborhood that you were not the one that left two ounces of narcotics under a mail box?"

The court asked counsel if the question related to the narcotics charge against Mandanici to which he had pleaded guilty. Counsel answered:

> "Yes, it does, your Honor, but it is not—
>
> "The Court: * * * Was that statement made in your presence?
>
> "Counsel: No, it was not.
>
> "The Court: Did it come to you at the time you were representing him as a lawyer?

"Counsel: Yes, your Honor, it did, but that—

"The Court: Sustained. We are not concerned about that."

On the following day, counsel for one of the other appellants was cross examining Mandanici and asked:

"Q. Mr. Mandanici, I believe yesterday afternoon Mr. Redmond was cross examining you, is that correct? A. Yes.

"Q. And at one point he asked you certain questions concerning conversations that you and he had while he was your lawyer, is that correct? A. Yes.

"Q. And you refused to answer that because you wanted to avail yourself of the privilege a client has?"

We do not have the transcript of the above portion of the record before us, as it was not included in the printed appendices, as required by the Rules of this Court, if the judges are to consider it; and we take the excerpts not from the record, but merely from statements in the briefs. But the last questions, above quoted, seem to refer to *conversations* between Mandanici and his counsel; and these would clearly be privileged. If they were not conversations, but related to something that his counsel had heard from third parties, while engaged in his defense, the cross examination was obviously being carried on by Mandanici's former attorney for the purpose of attacking his credibility. But even though Mandanici had told his friends that he did not put two ounces of heroin under the mail box, as was suggested in counsel's question, that would not contradict anything he had testified to; and the court properly limited the cross examination with regard to such extraneous matter.

Appellant Yoslovitz claims error because the trial court did not grant him a severance and a separate trial.

He was indicted with nineteen others for the conspiracy, and with other defendants for substantive offenses. He was convicted on one conspiracy count and one substantive count. A defendant is not entitled to a severance in a conspiracy case; *Metcalf v. United States*, 195 F. (2d) 213 (C. A. 6); and he was properly indicted both for conspiracy and for the substantive offense; *Chadwick v. United States*, 117 F. (2d) 902 (C. C. A. 5). There was substantial evidence to support his conviction for conspiracy.

The count of the indictment which charged Yoslovitz with violation of the substantive offense pertained to a kilo of pure heroin which he had obtained from appellant Romano in New York. Subsequently, a part of that heroin was analyzed by a government chemist who found that it contained heroin. Thereafter, the drug was destroyed, after the disposition of certain cases before the court, since there did not, at that time, appear to be future need for it. On the trial, the chemist testified that he had analyzed the substance and found it to contain heroin; that he mailed it to the Drugs Disposal Committee in Washington; and a member of that committee testified that it had been destroyed. The court held that the fact that the narcotics were destroyed after analysis did not prevent introduction of the proof of such analysis, and that the fact that the drug had been destroyed went solely to the weight of the evidence. We consider this a correct ruling. In any event, Yoslovitz was sentenced to two and a half years on each of the two counts, the sentences to run concurrently. Even though a sentence on one of such counts be erroneous, the fact that they were concurrent would not prejudice appellant. When sentences run concurrently on a multiple-count indictment, even if error exists as to one count, it will not affect the sentence or require a reversal. *Singer v. United States*, 208 F. (2d) 477 (C. A. 6); *Hupman v. United States*, 219 F. (2d) 243 (C. A. 6).

Appellant Poliafico was sentenced to serve five years on the conspiracy count and five years on each of the substantive counts. He contends that the evidence proving the substantive counts included every element of the offense charged in the conspiracy count, and that, therefore, the sentence on the conspiracy count constituted error and should be set aside. In advancing his contention, appellant relies upon our holding in *Krench v. United States,* 42 F. (2d) 354, in which it was held that where a defendant had been charged in a substantive count with unlawfully bringing merchandise into the country, and on a count for conspiracy to commit the substantive offense, a sentence on each of the two counts would constitute double punishment. In the *Krench* case, proof of the substantive offense included every element of the conspiracy. But under the facts of that case, the defendant was, in reality and in law, being punished twice for the same act. This was because, although the substantive offense charged him with unlawfully bringing the merchandise into the country, he did not actually do so himself, but only *procured* others to do so. In effect, it was held that procuring others to bring merchandise into the country, and conspiring with others to bring it in, constituted the same act and was proved by the same evidence; and that a sentence on each of the two counts could not stand. In the instant case, there is some slight similarity to the *Krench* case in that appellant was convicted of unlawfully and knowingly *facilitating* the transportation and concealment of the heroin, and of conspiring to facilitate the transportation, as well as unlawfully conspiring to purchase, distribute, and sell the narcotics. But, in any event, there is here no reversible error in the court's sentence of Poliafico on the conspiracy count and on the three substantive counts, inasmuch as the conspiracy

count was made to run concurrently with one of the substantive counts. As heretofore said, even if error exists as to one count, it will not affect a valid sentence on another count, if the sentences run concurrently. As to the three substantive counts, they were based upon different acts of appellant committed during different months, and each required different evidence. With respect to the sentences on these counts, there was no error.

Appellant Pieri raises the question of proper venue as to him, and contends that the trial court erred in denying his motion for acquittal on the substantive counts that he had facilitated the transportation and concealment of narcotic drugs in the Northern District of Ohio, inasmuch as the government's proofs purported to show only deliveries of heroin by Pieri in Buffalo, New York, and in Erie, Pennsylvania. The question of venue was not raised until the conclusion of the government's proofs. Objection to venue is waived by going to trial on the merits without raising the question. *United States v. Jones*, 162 F. (2d) 72 (C. C. A. 2); *Hagner v. United States*, 54 F. (2d) 446 (C. A. D. C.). Moreover, the evidence is to the effect that when Pieri handed these narcotics to one of the other appellants, knowing that the latter would take them to Cleveland, he facilitated their transportation into the Northern District of Ohio. Under Title 18 U. S. C. § 3237, it is provided that any offense against the United States, begun in one district and completed in another, may be prosecuted in any district in which such offense was begun, continued, or completed, and that any offense involving transportation in interstate commerce may be prosecuted in any district from, through, or into which such commerce moves. The above section makes transportation a continuing offense; and venue as to Pieri would lie either in Pennsylvania or Ohio.

Much importance is given in the briefs of two of the appellants to claimed error of the trial court in receiving certain evidence bearing upon the presence in Cleveland of appellants Crisci and Riccobene in January, 1952. Consolo, in his testimony, definitely stated that the two appellants were in a room in the Tudor Arms Hotel in Cleveland on or about January 10, 1952. The secretary and treasurer of the hotel testified that the two registration cards showed that Crisci, alias Crish, and Riccobene, alias Di Marco, registered in the hotel on that date, and both occupied Room 1022 through January 14. In addition, the hotel official testified that the registration cards are filled out by the guest rather than by the clerk. The testimony of the hotel official was not objected to. Counsel for Crisci, however, objected to the receipt of the registration cards in evidence.

As to another occasion, both Consolo and Mandanici testified that Crisci stayed at the Colonial House Motel in January 1952. The manager of the motel testified that the original registration cards had been destroyed in a fire, but that a daily transcript of such cards showed Crisci occupied a room in the motel from January 15 to January 19.

Counsel for Crisci sought to have the bail bond applications of Crisci and Riccobene introduced in evidence in order that the jury could compare the signatures thereon with the signatures on the Tudor Arms Hotel registration cards. But the government did not contend that appellants had signed the cards. The court's ruling permitting the registration cards to be introduced in evidence and refusing to admit the bail bond applications to be introduced could not be said to constitute prejudicial, reversible error; and the same is true of the trial court's refusal to instruct the jury that there was no evidence that Crisci had regis-

tered at the Tudor Arms Hotel, especially in the light of the uncontradicted testimony of the government witnesses that Riccobene and Crisci had occupied a room in that hotel, and that Crisci had occupied a room in the motel, during the time in question.

Many other complaints are made by appellants with respect to the rulings of the trial court during the case and his failure to instruct the jury as requested. It was not error for the court to exclude proffered testimony of the witness Giaimo as to conversations, with the government witness Mandanici, with regard to making trips to Chicago and getting packages for him containing something undisclosed, in view of the fact that Mandanici had not been questioned as to any of the matter sought to be shown by such witness, and that the proffered testimony in no way tended to controvert anything that Mandanici had testified to. *Robinson v. United States*, 144 F. (2d) 392 (C. C. A. 6). As to the testimony of defendant Filicia who had remained in the courtroom during Mandanici's testimony, and then pleaded guilty to two counts of the indictment, testifying thereafter as a government witness, it was not error to refuse to permit such testimony on the ground that he had remained in the courtroom after a separation of witnesses had been ordered by the court at the outset of the trial. In *Carrado v. United States*, 210 F. (2d) 712 (C. A. D. C.), the appealing parties likewise urged that they were damaged by the testimony of a defendant who, in the midst of the trial, was discharged, and thereafter testified for the government. The argument was advanced that such defendant had the advantage of hearing the testimony of the government witnesses before she testified, and that her counsel had, up to that time, participated in conferences with the counsel of the other defendants. The court, however, ruled that until the witness was discharged as a de-

fendant, she was required to be in the courtroom, and that there was no error regardless of any speculative prejudice to the other defendants because of her presence.

As to the claimed error of the court in permitting the substitution of the name, Riccobene, in the indictment for the name, John Doe, it appears from the record that such substitution was made with Riccobene's consent, his attorney on several occasions stating to the court that in this regard, he had no objection.

With respect to Poliafico's contention that the trial court refused to give his requested instruction relating to character evidence, the instructions, as given by the court in this regard, were correct. Poliafico had requested the court to charge the jury that evidence introduced on his behalf tending to establish his good character and reputation might, in itself, be sufficient to create a reasonable doubt in the minds of the jury as to his guilt. The court, however, charged instead that the jury could consider such evidence and determine its weight, together with all the other evidence in the case, in arriving at their verdict as to his innocence or guilt. Such an instruction was proper. *Edgington v. United States,* 164 U. S. 361, 366; *Gariepy v. United States, supra.*

Appellants Riccobene, Erra, and Crisci claim error on the ground that the trial court did not charge the jury as requested by them in the following language:

> "The failure of any defendant to take the witness stand and testify in his own behalf in this trial does not create any presumption against him. The jury is charged that it must not permit that fact to weigh in the slightest degree against him, nor should this fact ever enter into the discussion or deliberations of the jury in any manner. The Government must prove the guilt of the defendant by its own evidence, and if it

fails to do this, or it is not free from doubt, the verdict must be not guilty."

On this phase of the case, the court charged the jury:

"Some of the defendants appeared as witnesses in their own behalf, other defendants did not. The defendants Botta, Simons, Warren, Crish, Naselli, Riccobene, and Erra, did not appear and testify as witnesses in this case, but you are not permitted under the law to draw any inference of guilt because of the fact that any of these defendants failed to testify in his own behalf. Consequently, you will draw no such inference against any of them because they did not testify as witnesses."

No exceptions were taken to the charge as given. In any event, it was not erroneous. While Title 18 U. S. C., Section 3481, provides that the failure of a defendant to testify in a criminal case "shall not create any presumption against him," it is not necessary to charge the jury in the identical language used in the statute; and an instruction that the jury is not permitted to draw any inferences of guilt because of the failure of a defendant to testify, together with the instruction, as given by the court, that the defendants were clothed with the presumption of innocence which remained with them throughout the case "until such time, if at all, as from a consideration of all the evidence you are convinced, beyond a reasonable doubt, of the guilt of one, some, or all of the defendants," completely safeguard appellants' rights within the intendment of the statute. Moreover, the court further charged, in this connection, that "the burden rests upon the Government to establish the guilt of the defendants beyond a reasonable doubt. This burden remains upon the Government throughout the case, the burden does not shift to the defendants. The defendants are not required to

establish their innocence." There was no error in the charge of the court in this regard.

With respect to the contention that the district court committed error in refusing to charge that there was no evidence that Riccobene had received money from the operation of the conspiracy, as well as the complaint regarding the instructions relating to the testimony of accomplices, no exceptions were taken and no merit appears therein. Under federal law, the uncorroborated testimony of an accomplice is sufficient to sustain a verdict of guilty. *Nilva v. United States*, 212 F. (2d) 115 (C. A. 8). *Opper v. United States*, 348 U. S. 84, relied upon by appellants, stands only for the proposition that extrajudicial admissions of essential facts or elements of a crime, made subsequent thereto, as well as confessions, require corroboration by independent evidence. See *United States v. Cipullo*, 170 F. (2d) 311 (C. A. 2), in which an instruction similar to the one given in the instant case was upheld.

The closing arguments of the district attorney to the jury were not improper or prejudicial; and claims that the district court exhibited a bias which, in its cumulative effect, prejudiced appellants, are not sustained by the record.

Counsel for Riccobene and Crisci further contend that the court committed prejudicial error by refusing to charge the jury, in compliance with their requests, as to the extent of their liability as co-conspirators. These claims reflect the untiring zeal of assiduous counsel, but appear to be without substance. In this regard, the court did instruct the jury: "Mere association with other conspirators, without more, is not sufficient to convict a person of being a conspirator," and properly covered the point concerning which appellants complain. On the whole, the court's charge correctly instructed the jury as to the law

of conspiracy and the proof necessary to sustain a conviction of the parties charged.

It is submitted that the court erred in refusing to charge the jury as follows:

> "The court charges the jury that certain conversations have been admitted in evidence and are to be considered by you if you find that a conspiracy existed. These conversations, however, may not be applied to any other count but the conspiracy count, unless the conversations were in the presence of the other defendants affected."

As the government suggests, the requested charge is vague and indefinite, and no exception, as is required by Rule 30 of the Federal Rules of Criminal Procedure, was taken to the charge which the court gave in the following language:

> "* * * it is the law that any declaration made by any one of the conspirators during the period of the conspiracy, and in furtherance thereof, may be considered as evidence not only against the person or persons making such declaration, but against all those who were members of the conspiracy at the time such declarations were made. However, acts and declarations not in furtherance of the conspiracy, even if made during the period thereof, are binding only upon those who make them, and before acts and declarations may be binding upon those who do not make them there must be other proof connecting such persons with the conspiracy."

There was no error on the part of the trial court in refusing to give the requested instruction.

With regard to the trial court's instruction as to the possession of one of the defendants being considered the possession of all, which is urged as error by appellants, the court, in effect, charged that once a conspiracy is

established, a substantive offense committed by one conspirator pursuant to the conspiracy is attributable to the other conspirators, even though they were not present when the substantive offense was committed. This is in keeping with the rule announced in *Pinkerton v. United States*, 328 U. S. 640.

Other contentions and arguments of appellants are without substance.

In accordance with the foregoing, the judgments of the district court are affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Identical orders entered August 31, 1956 in Appeal Nos. 12,476 to 12,484, incl.)

Before: SIMONS, *Chief Judge;* ALLEN & MCALLISTER, *Circuit Judges.*

APPEAL from the District Court of the United States for the Northern District of Ohio.

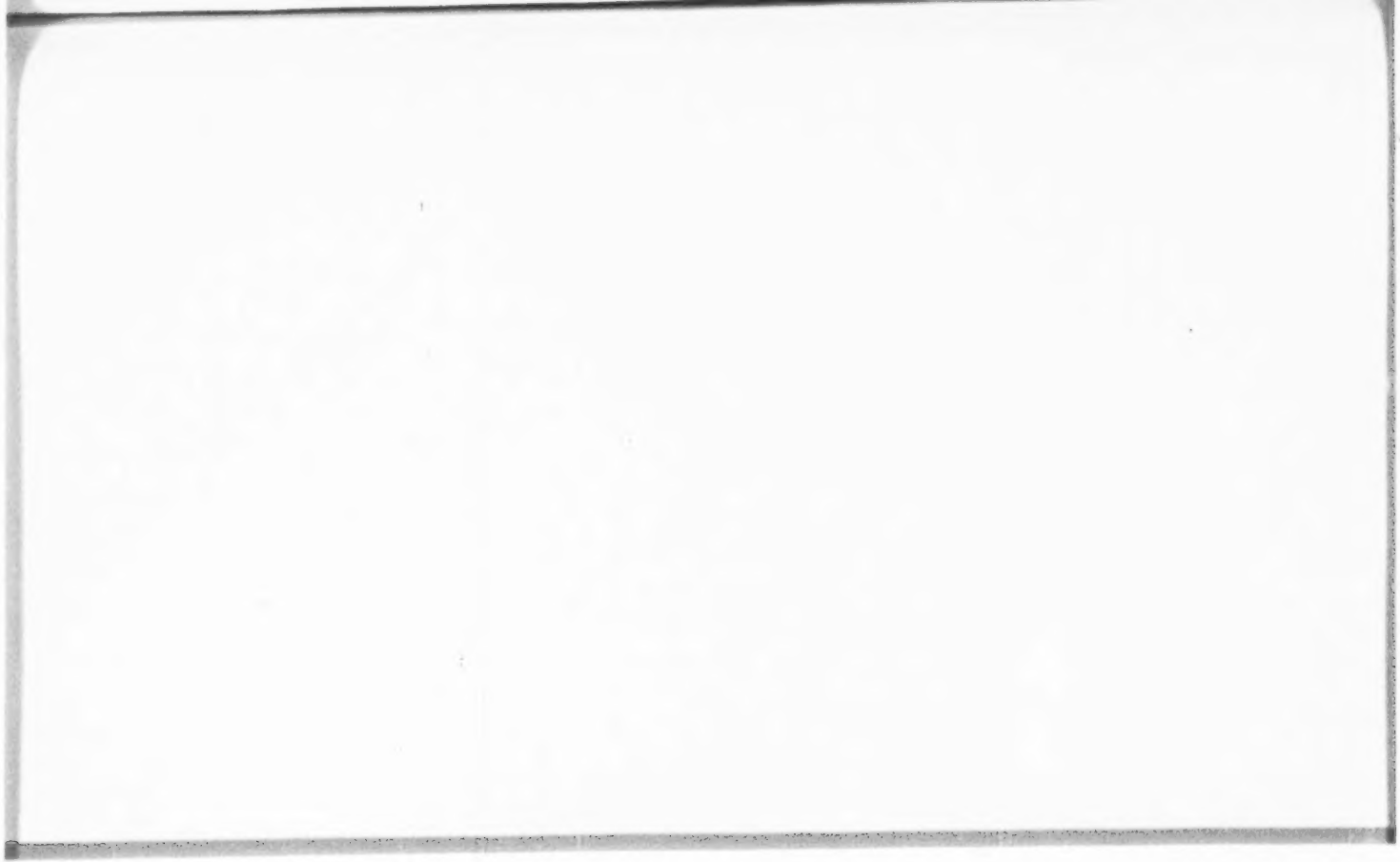
THIS CAUSE came on to be heard on the transcript of record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

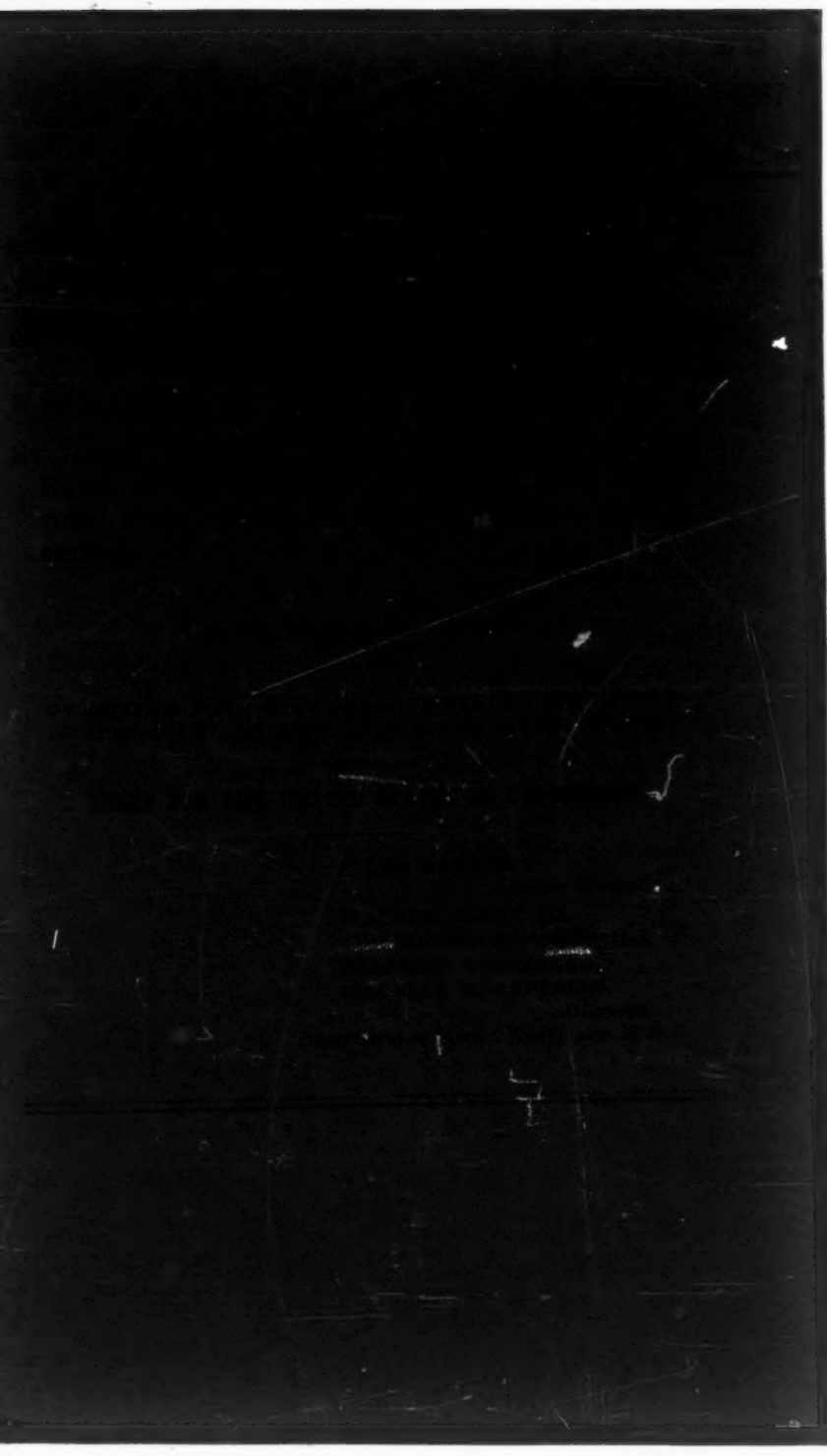
ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING PETITIONS FOR REHEARING.

(Filed November 26, 1956.)

The petitions for rehearing in the above cases are denied.





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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 701

SYLVESTER POLIAFICO, SALVATORE LAZZARO, NUNZIO ROMANO, BEN YOSLOVITZ, ANTHONY CRISCI, SALVATORE PIERI, MICHAEL ERRA, ANTHONY NASELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–32a) is reported at 237 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals (Pet. 32a) was entered on August 31, 1956. A petition for rehearing was denied on November 26, 1956 (Pet. 32a). On December 21, 1956, Mr. Justice Reed extended the time for filing this petition to and including January 25, 1957. The petition was filed on January 22, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the indictment and the proof, in that one conspiracy was charged and several were proved.

2. Whether venue of substantive counts charging sale and facilitation of the transportation of narcotics was properly laid in the district to which the narcotics were transported.

3. Whether conspiracy to violate the narcotics laws and the substantive violations charged constituted separate offenses.

4. Whether it was error to deny a challenge to a jury array, refusing to summon the jury commissioner to testify as to the manner of the selection, when the challenge was not supported by any evidence that the selection was not in accordance with law.

5. Whether, on a charge of conspiracy to violate the narcotics laws, it is necessary to prove that the substances handled as narcotics by the co-conspirators were actually narcotics.

6. Whether reversible error resulted from rulings on the admissibility of evidence.

7. Whether reversible error resulted from the court's charge to the jury.

STATUTES INVOLVED

18 U. S. C. 2 (a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Section 2 (c) of the Narcotic Drugs, Import and Export Act of 1909, 35 Stat. 614, as amended, 38 Stat.

275 (1914); 42 Stat. 596 (1922); 43 Stat. 657 (1924); 65 Stat. 767 (1951); 21 U. S. C. 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *

Sections 2553 (a) and 2554 (a) of the Internal Revenue Code of 1939, 53 Stat. 271, 272, as amended, 67 Stat. 506 (1953); 26 U. S. C. (Supp. 1) 2553 (a) and 2554 (a), provided:[1]

> § 2553. Packages—(a) General requirement.
>
> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; * * *.
>
> * * * * *
>
> § 2554. Order forms—(a) General requirement.
>
> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered,

[1] Now found in Sections 4704 (a) and 4705 (a) of the Internal Revenue Code of 1954, 68A Stat. 550, 551; 26 U. S. C. (Supp. III) 4704 (a) and 4705 (a).

exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

STATEMENT

An indictment filed in the District Court for the Northern District of Ohio charged petitioners, along with twelve other defendants, with conspiring to violate the narcotic laws of the United States, namely, 21 U. S. C. 174, 26 U. S. C. 2553 (a) and 2554 (a), and 18 U. S. C. 2 (a) (*supra*, pp. 2–3). Certain petitioners, as well as other defendants, were also charged with various substantive violations of the narcotic laws (see Ric. 3–14).[2]

Eighteen of the twenty defendants went to trial, Mazzie having been severed from the case on the ground of illness, and Consolo having pleaded guilty prior to trial. Filicia and Desimone pleaded guilty during the course of the trial (Gov. 84, 85). The case was presented to the jury against thirteen defendants on four counts, count 1 charging conspiracy, and counts 2, 11, and 16 charging substantive offenses. The jury found one defendant not guilty, and the remaining defendants guilty of the conspiracy (Crisci, 15a–16a). In addition, petitioner Poliafico was found guilty of counts 2, 11, and 16; petitioners Romano and Yoslovitz on count 2; and petitioner Pieri on counts 11 and 16 (Crisci 15a–16a).

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[2] Citations are to the appendices of appellee and appellants in the Court of Appeals, which form a part of the record filed with this Court. They will be designated as follows: appellants Riccobene—"Ric.", Poliafico—"Polo.", Yoslovitz—"Yos.", Crisci—"Crisci", and Lazzaro—"Laz."; and appellee—"Gov."

Sentences imposed upon petitioners were as follows: Poliafico received a total of fifteen years—5 years on count 1 to run concurrently with five years on count 2, and 5 years each on counts 11 and 16 to run consecutively (Polo. 139–140); Lazzaro, 3½ years on count 1 (Laz. Br. 1); Romano, concurrent terms of 5 years each on counts 1 and 2 (Laz. Br. 1, 2); Yoslovitz, concurrent terms of 3½ years each on counts 1 and 2 (Yos. 17a); Crisci and Erra, 5 years on count 1 (Crisci 17a; Polo. 141–142); Pieri, a total of 10 years—5 years on count 1 to run concurrently with 5 years on count 11, and 5 years on count 16 to run consecutively (Polo. 140–141); Naselli, 4 years, effective upon release from the term he was then serving (Polo. 142–143). Fines of $25, or less, levied upon Poliafico, Romano, Yoslovitz, and Pieri, were suspended. On appeal, all convictions were affirmed (Pet. 32a).

The conspiracy which petitioners were alleged to have engaged in was a continuing scheme to buy heroin in large, unadulterated quantities, and then resell it in small adulterated portions at a profit.

James Mandanici, named as a co-conspirator, and Frank Consolo were two of the chief government witnesses. Their testimony may be summarized as follows:

The conspiracy commenced in Cleveland, Ohio, when petitioner Poliafico, alias Polo, solicited Mandanici and Consolo to deliver narcotics for $100 per week. Poliafico told them that some heroin was coming in from New York and as soon as it arrived they could start the narcotic traffic (Ric. 21–22, 81–83). A few

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days later, about January 10, 1952, Consolo, petitioner Crisci (alias Crish), Poliafico and Riccobene were all in Consolo's apartment to which Riccobene brought a half kilo of heroin. Riccobene showed the others how to adulterate the narcotics and they weighed up 37 ounce packages (Ric. 85–92). Mandanici, also present in Consolo's apartment on January 10, remained in another room while the heroin was being mixed, but Consolo told him a half kilo of pure heroin had come in from New York and that the others were mixing it (Ric. 23–24).

During this meeting and at other times, financial arrangements were discussed. Riccobene at first, and later Crisci, made it clear that the narcotics were on consignment and would have to be paid for as they were sold (Ric. 93, 108). Crisci said he was going to stay in Cleveland until he collected some money to take back to New York (Ric. 33). Mandanici was told that he was to receive $100 a week (Ric. 35, 95). He was also told that Poliafico, Crisci, Consolo and Riccobene were partners and that if Consolo went away (on a Dyer Act charge) he (Mandanici) would become a partner (Ric. 35).

The first half kilo of heroin cost $7,500 or $8,000. Poliafico and Crisci told Mandanici and Consolo how much to charge for ounce lots (Ric. 40–42, 93). Mandanici and Consolo sold this heroin to the defendants Simmons and Warren (Ric. 37–38, 100–103) and turned the money over to Poliafico who, turn, paid it to Crisci (Ric. 41, 108–109; Gov. 73–74). On one occasion, Mandanici and Consolo turned over $400 directly to Crisci (Ric. 104–105). The money collected over and

above the cost of the half kilo of heroin was to be split four ways between Crisci, Riccobene, Poliafico and Consolo (Ric. 42–43). Mandanici received $100 per week until Consolo went to jail in March of 1952 (Ric. 42). Thereafter Mandanici was taken in as a partner and the profits were then split between Poliafico, Crisci, Riccobene and Mandanici (Ric. 43).

The first half kilo of heroin lasted until the middle of March 1952. When the supply was getting low Mandanici told Poliafico, who made arrangements for Crisci and petitioner Naselli to bring some more in from New York (Ric. 49). Accordingly, in March of 1952, Poliafico and Mandanici met Crisci and Naselli outside of Cleveland on Route 422 and there received another half kilo of heroin (Ric. 50). This second half kilo of heroin cost $7,500 and was also on consignment (Gov. 78). Mandanici cut it to make 123 ounces out of it (Ric. 52). It lasted about two months (Ric. 53).

Several times Crisci came to Cleveland to collect money in payment for the heroin and other times he sent Naselli (Ric. 52–53). Sometimes the money was sent to Crisci via Western Union (Ric. 53–54).

Some time in April of 1952, Mandanici was introduced to petitioner Erra by Poliafico (Gov. 9–10). When Poliafico asked Erra if he could get some cocaine for them, Erra said he would call his partner, "Nunzie" (petitioner Nunzio Romano), in New York (Gov. 10, 12). After a second conversation in May, 1952 (Gov. 9, 14), Erra told them he had made arrangements for Poliafico to go to New York to see "Rogie" (Rocco Mazzie) (Gov. 14). Poliafico then

went to New York. When he returned, he told Mandanici that he saw Mazzie and gave him $2,500 as a downpayment on a half kilo of heroin which, in a day or two, would be brought to Cleveland via plane by a man named Sal (petitioner Sal Lazzaro) (Gov. 16). As planned, a day or two later, Lazzaro arrived at the Cleveland Airport, where Poliafico introduced Mandanici to him, and Lazzaro turned over to Mandanici a half kilo of heroin (Gov. 16–18).

During the latter part of April or early part of May 1952, Naselli also delivered a quarter kilo of heroin to Mandanici (Gov. 19–20). This heroin, together with the half kilo previously delivered by Lazzaro, was adulterated and sold to Simmons and Filicia (Gov. 21, 22–23).[3] The quarter kilo of heroin brought in by Naselli and the half kilo of heroin delivered by Lazzaro lasted two and one-half to three months (Gov. 24).

During the latter part of June 1952, Poliafico told Mandanici that the cocaine was ready in New York and it was necessary to send someone there to get it (Gov. 24). Mandanici sent his brother, Joe Menage (Gov. 24–26), who called a number which had been given him and obtained a package which he brought back to Mandanici (Gov. 25, 95). This package, containing ten ounces of cocaine, was delivered by Mandanici to Simmons (Gov. 25–26).

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[3] Mandanici sold narcotics to Filicia about three times a week from June or July of 1952 until the time of his, Mandanici's, arrest in October of 1953 (Gov. 21–22). This was testified to by Filicia as well as Mandanici (Polo. 52; Ric. 38). Simmons admitted to a narcotics agent that he bought narcotics from Mandanici from January, 1952 to October, 1953 (Gov. 142–144).

Early in August of 1952, Mandanici met Poliafico, Erra and petitioner Ben Yoslovitz, alias Farmer, in Cleveland. The four of them went to Yoslovitz's apartment from which Yoslovitz brought out a half kilo of heroin which he gave to Mandanici (Gov. 28). Mandanici made 123 ounces out of this half kilo of heroin and he sold it to Simmons and Filicia during the next two months (Gov. 29). This half kilo of heroin came from Nunzio Romano in New York (Gov. 31). Mandanici first met Romano in Cleveland during the latter part of August 1952 in company with DeSimone and Poliafico (Gov. 32), who were introduced as partners in New York who had come for the money for the half kilo of heroin (Gov. 33). Mandanici then gave Poliafico the money he had collected from Simmons and Filicia (Gov. 35).[4]

Early in October of 1952, Mandanici was told by Poliafico that Yoslovitz had been given $200 to go to New York to get heroin from Romano and Tony (De Simone) (Gov. 39). Three or four days later, Mandanici and Poliofico met Yoslovitz, who told them he had brought a kilo (35 ounces) of heroin back from New York (Yos. 10a). The next day, Yoslovitz turned over the kilo of heroin to Mandanici, who took it to Munici's house and there cut it with milk sugar and quinine (Gov.

[4] During the latter part of September of 1952, some secret narcotic indictments against one Alex Clarco were released in Cleveland, and because of them Poliafico and Mandanici decided to go to New York for a few days to see if any indictments came out against them (Gov. 36). While in New York, they met Erra and Romano and told them they were going to "lay dead" for awhile and not to expect money so fast because of the Cleveland indictments (Gov. 37–38).

39). This kilo of heroin came from Romano and DeSimone (Gov. 43–44).[5]

Poliafico and Mandanici first started using quinine to mix with heroin about January of 1953 (Gov. 40) after Mandanici and Filicia had been getting complaints that the heroin was sticking in the needles used by narcotics addicts (Gov. 76; Polo. 54–55). In June of 1952, when Rogie (Rocco Mazzie) was in Cleveland, Poliafico asked him to get some quinine (Gov. 30–31). About October or November of 1952, Poliafico told Mandanici that the quinine was being mailed by Nunzie (Romano) from New York (Gov. 40–41). In January of 1953, Lazzaro, while in Cleveland, showed Mandanici how to cut the heroin with quinine (Gov. 41–42).

About May of 1953, Poliafico told Mandanici that he was going to make arrangements with petitioner, Sam Pieri, to get heroin out of Buffalo (Gov. 45). Accordingly, Poliafico, Yoslovitz and Mandanici met Pieri and Rizzo by prearrangement on the outskirts of Erie, Pennsylvania. Poliafico asked Pieri if he could get some heroin for him and Pieri said he would let him know in a few days (Gov. 45–47). Later that same month, Poliafico and Mandanici met Pieri in Buffalo, New York, and received ten ounces of unadulterated heroin from him (Gov. 47–48). Poliafico and Mandanici then returned to Cleveland and dropped the heroin off at Munici's house. It was later adulterated and the 72 ounces made therefrom were sold to Filicia and Simmons (Gov. 49).

The ten ounces received from Pieri in Buffalo lasted about two months (Gov. 50). In the early part

[5] This is the transaction involved in count 2.

of July 1953, Mandanici and the defendant Bucci drove to Erie, Pennsylvania, where they met Poliafico and Pieri (Gov. 51–52). Pieri transferred ten more ounces of unadulterated heroin to Mandanici (Gov. 51–52). Mandanici and Bucci then brought the heroin back to Cleveland and cut it into 72 ounces of adulterated heroin (Gov. 52–53).[6] Bucci and Mandanici sold part of this heroin to Filicia (Gov. 52–53; Polo. 59–60).[7]

In October 1953, Mandanici, the defendant Filicia and a girl drove to Erie (Gov. 53–54; Polo. 63–65). There, Mandanici again met Pieri and Poliafico and the three of them went to Pieri's car where ten more ounces of heroin were turned over to Mandanici (Gov. 53–55). Mandanici put the package of heroin in Filicia's car and he brought it back to Cleveland. Mandanici returned to Cleveland later that evening with Poliafico. The following morning, Mandanici met Filicia and Filicia turned over the ten ounces of heroin to him (Gov. 54–55; Polo. 66–67). Mandanici took this ten ounces of heroin to Consolo's house where he made 80 ounces out of it by mixing it with quinine and milk sugar (Gov. 55).[8]

The testimony of Mandanici and Consolo, who had not seen or communicated with each other since March of 1952 (Gov. 73; Ric. 98), was corroborated

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[6] This transaction was the one involved in count 11.

[7] On two occasions, September 14, 1953, and September 24, 1953, Filicia, acting in conjunction with government agents, purchased an ounce of heroin from Mandanici and turned it over to narcotics agent Voll (Polo. 60–63; Gov. 146–150).

[8] This transaction was the one involved in count 16.

by 38 other government witnesses and by 41 government exhibits.

ARGUMENT

1. Petitioner Pieri contends (Pet. 35–37) that since he was only one of several suppliers he was improperly joined in a single conspiracy charge with the other defendants. The evidence, however, clearly establishes a single conspiracy, with Poliafico, Consolo, and Mandanici at its core, to engage in illegal narcotics traffic in Cleveland. All who dealt with them, whether as buyer or seller, knew that they were part of a larger enterprise by which the narcotics went from wholesaler to retailer.

The thread of the conspiracy was not broken by the fact that the suppliers, of whom Pieri was one, joined at different times, and were not shown to have known one another. Although the law of conspiracy requires that all the conspirators know and join in the common purpose and plan, they need not all know each other or all the details of the operation. *Blumenthal* v. *United States*, 332 U. S. 539, 557. The conspiracy in *Blumenthal* was between a supplier and various salesmen to sell liquor at a higher price than set by law. The salesmen were not shown to have known each other, or the exact limits of the plan, but nevertheless, as here, they were part of a single conspiracy joined in the attainment of a common goal. 332 U. S. at 557–559. See also *United States* v. *Witt*, 215 F. 2d 580, 583 (C. A. 2), certiorari denied, *sub nom.*, *Talanker* v. *United States*, 348 U. S. 887; *United States* v. *Tramaglino*, 197 F. 2d 928, 930–931 (C. A. 2), certiorari denied, 344 U. S. 864; *Chadwick* v. *United*

States, 117 F. 2d 902, 903–904 (C. A. 5), certiorari denied, 313 U. S. 585; *Short* v. *United States*, 91 F. 2d 614, 617–618 (C. A. 4); and *Rudner* v. *United States*, 281 Fed. 516, 519–520 (C. A. 6), certiorari denied, 260 U. S. 734.

Moreover, Pieri's sentence need not rest on the conspiracy count. It may be supported on the two substantive counts, each relating to a sale of narcotics for transportation to Cleveland, which he was clearly shown to have made. These two counts were separate from the conspiracy count and had to be considered separately by the jury.

2. Petitioners Pieri and Poliafico contend that venue of counts 11 and 16 was improperly laid in the Northern District of Ohio because the evidence showed that the activities alleged in those counts took place in Buffalo, New York, and Erie, Pennsylvania (Pet. 37–38).

Counts 11 and 16 charge that petitioners Pieri and Poliafico, *inter alia*, "did * * * facilitate the transportation" of narcotics (Ric. 14). The evidence showed that narcotics were turned over in New York and Pennsylvania with the knowledge that they would be transported into the Northern District of Ohio, and that they were so transported (Statement, *supra*, pp. 10–11).

Since the indictment charged, and the proof established, an offense involving transportation in interstate commerce, venue, under the provisions of 18 U. S. C. 3237,[9] would lie in any district in which such an offense was begun, continued, or completed.

[9] 18 U. S. C. 3237 provides in part:

"Any offense involving the use of the mails, or transportation

Moreover, as the court below held (Pet. 25a), the question of venue was waived by the petitioners by their failure to raise it until the conclusion of the government's case. See *Lii* v. *United States,* 198 F. 2d 109, 113 (C. A. 9); *United States* v. *Jones,* 162 F. 2d 72, 73 (C. A. 2); *Hagner* v. *United States,* 54 F. 2d 446, 447 (C. A. D. C.), affirmed, 285 U. S. 427.

3. Petitioner Poliafico refers the Court to his brief in the Court of Appeals in which he argued that the evidence to sustain the offenses of concealing and transporting narcotics, charged in counts 11 and 16, included every element of the offense charged in count 1, the conspiracy count, and that, therefore, double punishment results from his five-year sentence on the conspiracy count, which runs consecutively with his five-year sentences on counts 11 and 16 (Pet. 38). It is, however, well established that the agreement to do an unlawful act is distinct from the doing of the act. *Pereira* v. *United States,* 347 U. S. 1, 11–12; *Pinkerton* v. *United States,* 328 U. S. 640, 643–644.

4. Petitioners contend that they were erroneously denied a hearing on whether certain groups were excluded from the jury array (Pet. 31–34). The record, however, shows no factual foundation which would justify a hearing (Polo. 6–11; Gov. 4–8).

In the midst of selecting the jury, counsel for petitioner Pieri asked the court to summon the person or

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in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

persons who had acted in the capacity of a jury commissioner for an inquiry into the method and manner of impaneling the grand and petit juries. When the court informed counsel that there was a jury commissioner and that she resided in the Western Division of the District, counsel stated that he had not known of the existence of such an official. Counsel said he was not in a position to state that the selection was not made in accordance with the statutes, but was attacking it on the basis of a review of the panel itself and an examination of the names, which suggested to him a probability of the exclusion of certain national and racial groups. He also referred to the fact that some jurors had had jury service within a few months. He said it was his understanding, from what co-counsel in the case had told him, that the clerk prepared the list from names submitted by the marshal. He also stated he had no factual evidence to present to the court, either by affidavit or testimony, although the jury list had been available for at least two weeks.

The court ruled that it could not act favorably on the motion of defendants without any evidence to show that the selection of the jury was not made in accordance with law, and declined to summon the jury commissioner who was 200 miles distant. The court noted that counsel (who had been on the case for 17 days and replaced his associate) had had ample time to secure all the information he needed from the clerk of the court about the manner of selecting jurors. The court then overruled the challenge.

As the court below held (Pet. 19a), a challenge to the array must be supported by evidence, not sus-

picions. *Frazier* v. *United States*, 335 U. S. 497, 503; *United States* v. *Dennis*, 183 F. 2d 201, 216 (C. A. 2), affirmed, 341 U. S. 494.

5. Petitioners argue that the evidence was insufficient in that there was no proof that the substances Riccobene carried to the apartment of Consolo, and the substances obtained by Poliafico and Mandanici from Naselli and Crisci, were actually heroin, although Consolo and Mandanici stated they were (Pet. 39–40).

Petitioners have confused the proof necessary to establish a conspiracy to violate the law with that required to show a substantive violation thereof. On a charge of committing a substantive violation of the narcotic laws, the government must, indeed, establish that the substance involved was actually a narcotic, as it constitutes the *corpus delicti*. On the substantive counts involved here, the government did establish the nature of the substances involved to be heroin (Gov. 129–134, 154, 155–157, 158–159, 160–161). The cases cited by petitioner (Pet. 40), in which the government proved the existence of narcotics, all involved substantive counts of violating the narcotics law.

However, the *corpus delicti* of a conspiracy is the illegal agreement, and proof of its formation and an overt act taken pursuant thereto establish the crime. The overt act itself need not even be a crime. *Braverman* v. *United States*, 317 U. S. 49, 53. Thus, when the government proved that the petitioners agreed to violate the narcotic laws and took a step to carry it out (actually, the government showed 49 overt acts in furtherance of the conspiracy), proof of the crime of conspiracy was complete, without further need to show

that the substance handled by petitioners as heroin was, in fact, heroin.

6. Petitioners contend that various errors were committed in the admission of evidence.

a. Petitioners allege (Pet. 19–22) that reversible error was committed when on cross-examination of the witness Mandanici, who had already stated he was being detained in jail, the trial judge excluded a question as to the location of the jail. Almost immediately after the evidence was excluded, the witness stated the location of the jail (Gov. 67). Since the evidence excluded was elicited on subsequent cross-examination, there could be no prejudice resulting from the court's prior ruling (Pet. 14a).

b. Petitioners allege (Pet. 14–15) that the trial judge erred in refusing to order the production of written statements made by Mandanici to narcotics agents prior to trial for use on cross-examination, and that the error was not cured by the voluntary furnishing of the statements, several days later, with an offer to recall Mandanici for cross-examination.

At the time defense counsel asked for the production of the written statements of Mandanici, there had been no proof that they were inconsistent with his trial testimony and they had not been used in any way. It is therefore doubtful that they were entitled to them. See *Gordon* v. *United States*, 344 U. S. 414, where this Court held that production of written statements should have been ordered *after* a proper foundation had been laid, by showing, *inter alia*, that they were contradictory of present testimony. See also *Goldman* v. *United States*, 316 U. S. 129, 132. That

question need not, however, be reached since petitioners did in fact receive the pre-trial statements (Gov. 114–115), and they used them in cross-examining other witnesses (Crisci 8a). They had the opportunity to recall Mandanici for cross-examination, but, instead, entered into a stipulation as to a discrepancy between a portion of his written statement and the testimony of Consolo as to who showed them how to adulterate the heroin (Ric. 199). This minor discrepancy presented no real grounds for impeachment. Since petitioners have not demonstrated any prejudice resulting from the court's order which initially denied them the written statements, no reversible error is shown. Cf. *United States* v. *Fontana,* 231 F. 2d 807, 809 (C. A. 3).

c. Petitioners allege (Pet. 41–43) that error was committed in curtailing cross-examination of the witness Mandanici on matters which had come to the examining attorney's attention when he previously represented Mandanici on a narcotics charge. They claim the matters sought to be elicited were not within the client's privilege, and that counsel was not allowed to ascertain if Mandanici was willing to change his mind about claiming the privilege.

The pertinent facts are as follows:

One of the defense counsel, Mr. Redmond, had previously represented Mandanici on a narcotics charge. When the court discovered that he was cross-examining Mandanici as to conversations between them during that period, the court informed Mandanici of the privileged nature of the conversations. Mandanici

then declined to answer the questions (See Pet. 19a–20a).

Redmond nevertheless continued to query Mandanici as to matters relating to the narcotics case in which he had represented him (Laz. 5a–6a):

> Q. Did you ever tell your friends that lived in your neighborhood that you were not the one that left two ounces of narcotics under a mail box?
>
> Mr. CANARY. Now, your Honor, I object.
>
> The COURT. Mr. Redmond——
>
> Mr. REDMOND. Yes, your Honor.
>
> The COURT. Does this relate to the charge against him at that time?
>
> Mr. REDMOND. Yes, it does, your Honor, but it is not——
>
> The COURT. Just a moment. Was that statement made in your presence?
>
> Mr. REDMOND. That statement was given to me by other people—not to me, I mean——
>
> The COURT. Was it made in your presence?
>
> Mr. REDMOND. No, it was not.
>
> The COURT. Did it come to you at the time you were representing him as a lawyer?
>
> Mr. REDMOND. Yes, your Honor, it did, but that——
>
> The COURT. Sustained. We are not concerned about that.

* * * * *

Later, during the cross-examination of Mandanici by another defense counsel, Mandanici was asked if he had been asked questions by Mr. Redmond which pertained to conversations they had while in the attorney-client relationship and which he had refused

to answer on the basis of a privilege the client has. The following colloquy then took place (Laz. 6a–7a):

> The COURT. What is the purpose of going into that?
>
> Mr. MELTZER. I want to ask him whether he at this time is willing to waive the privilege so that he can relate to us what the conversation was.
>
> The COURT. Is there an objection to the question?
>
> Mr. CANARY. Well, I don't know whether there is a question, your Honor. If it is a question I object to it, yes.
>
> The COURT. Well, I will certainly sustain it.
>
> Mr. MELTZER. Your Honor, may I not ask this witness whether he is willing to waive at this time his privilege of testifying as to those conversations relating to this affair here, in the interest of justice?
>
> Mr. CANARY. No, I object to that statement.

* * * * *

Petitioners admit that the questions which related to conversations between Redmond and Mandanici while in an attorney-client relationship were covered by the privilege, but argue that the information which came to Redmond from other sources during that time was not. The court below noted that it appeared that all the questions did, in fact, pertain to conversations between Mandanici and counsel Redmond, in which case they were clearly privileged. It also found that even if some of the questions related to matters counsel Redmond had heard from third parties while engaged in Mandanici's defense, they were properly excluded (Pet. 22a). This was so because Mandanici

had not testified to anything contrary to the matters asked in the excluded questions. The questions were therefore worthless as a test of Mandanici's credibility. His cross-examination (which covered 417 pages of the transcript) was properly limited in this minor and collateral respect. Certainly, the limitation was not beyond the discretion that reposes in a trial judge to control cross-examination. *Glasser* v. *United States,* 315 U. S. 60, 83; *Gariepy* v. *United States,* 220 F. 2d 252, 263 (C. A. 6), certiorari denied, 350 U. S. 825; *United States* v. *Wheeler,* 219 F. 2d 773, 776–777 (C. A. 7), certiorari denied, 349 U. S. 944.[10]

d. Petitioners allege (Pet. 16–17) that prejudicial error was committed in permitting the defendant Filicia, after he pleaded guilty in the midst of the trial, to become a government witness. In this connection, the petitioners point out that other witnesses were excluded from the courtroom until called.

While a separation of witnesses was ordered at the outset of the case, Filicia was not at that time a witness, but a defendant whose presence in the courtroom was required (Rule 43, Federal Rules of Criminal Procedure). Certainly, the mere fact of his presence in the courtroom as a defendant did not affect his right to testify subsequently as a witness for the government. In *Carrado* v. *United States,* 210 F. 2d 712, 718–719 (C. A. D. C.), certiorari

[10] Nor was there an abuse of discretion in refusing to allow a later question as to whether Mandanici was willing to waive the privilege. The witness had already declared he would not waive the privilege; and there was nothing to indicate that he had changed his mind.

denied, *sub nom. Atkins* v. *United States,* 347 U. S. 1018, an identical situation occurred and the testimony was similarly permitted. Cf. *United States* v. *Beck,* 118 F. 2d 178, 183 (C. A. 7), certiorari denied, 313 U. S. 587.

The *Carrado* case was decided by the Court of Appeals for the District of Columbia after its decision in *Caldwell* v. *United States,* 205 F. 2d 879, upon which petitioners rely. The facts in *Caldwell* immediately explain the difference in result. In *Caldwell,* the testimony in question came from a man who had acted in a dual capacity as defense assistant and government agent; he had gained free access to the planning of the defense and had then reported in full to the government.

In the instant case, the government represented to the court that it had not received any information from Filicia with respect to any conferences or in relation to any matter which he learned in conference with defendants or their counsel (Gov. 169). No contrary evidence was submitted, although the court offered defense counsel an opportunity to do so (Gov. 168).

e. Petitioners allege (Pet. 17–19) that the exclusion of the proffered testimony of Mrs. Giaimo was erroneous.

Petitioners offered to prove by Mrs. Giaimo that she was Mandanici's landlady in 1953; that he told her of various trips he had made, but did not tell her where; that at one time he offered her $500 to pick up a package for him in Chicago, which she believed contained counterfeit money; that he made long dis-

tance telephone calls to Boston and California; and that the day after he was arrested on a narcotics charge he told her the police had beaten him up (Ric. 204–205; R. 2097–2100).

The court ruled that the witness could testify only as to the conversation she had with Mandanici the day after he was arrested, since the rest was not even remotely relevant and did not tend to disprove anything to which Mandanici had testified (Ric. 207).

Petitioners claim that the testimony of Mrs. Giaimo would have contradicted the testimony of Mandanici. It is well established, however, that before evidence is admissible to impeach the credibility of a witness, a proper foundation must first be laid by directing the witness's attention to the conversation with the particular person, to the time and place it was alleged to have occurred, and to the substance. *Robinson* v. *United States,* 144 F. 2d 392, 405 (C. A. 6), affirmed, 324 U. S. 282. See also, *Burton* v. *United States,* 175 F. 2d 960, 965 (C. A. 5), certiorari denied, 338 U. S. 909; *United States* v. *Angelo,* 153 F. 2d 247, 251 (C. A. 3); *Stinson* v. *Aluminum Company of America,* 141 F. 2d 682, 686 (C. A. 6). Since petitioners had established no foundation for Mrs. Giaimo's testimony, it was properly excluded.

f. Petitioners allege (Pet. 9–14) that it was error to permit the government to read to government witnesses Brunello and Artino portions of their contradictory grand jury testimony and prior written statements to narcotics agents, after they had unexpectedly turned hostile on the stand.

The prior contradictory matter was read under the following circumstances (Ric. 169–197; Polo. 22–50):

Sam Brunello, named as a co-conspirator but not indicted in this case, was called as a government witness. After testifying to certain preliminary matters, Bruno interrupted in the middle of question and volunteered, "Well, sir, everything in my testimony that I said were lies. I am here to tell the truth." He was then asked if he had made a trip to the Cleveland airport in the spring of 1952. (Mandanici had previously testified that Brunello had accompanied him to the airport in the spring of 1952 when Naselli delivered ten ounces of heroin to him there.) Brunello denied making any such trip to the airport, but volunteered that this was in his prior testimony. He also volunteered that he had been threatened with a $25,000 bond if he did not cooperate. In both his grand jury testimony and prior written statement, Brunello had stated he accompanied Mandanici to the Cleveland airport in May of 1952 when a package was delivered to Mandanici.

After Brunello indicated his hostility, he testified as to the time and place of the taking of his written statement and the persons present. He also identified the statement he had made. Then, for the purpose of refreshing his recollection, he was questioned as to whether he remembered being asked a particular question appearing in the statement (respecting his narcotic activities). He stated that he recalled it. He was then asked if he recalled his answer, and it was read to him. He stated he did not remember giving

that answer; that he remembered it being said, but that it was said by Mandanici and not by him. Another question and answer were then read to him in the same manner, and he denied making the answer. Then, as the government counsel was in the midst of reading another question from the witness' prior statement, counsel for the defendants objected for the first time.

After counsel entered an objection, the witness was asked if he remembered one more question that was asked him in his statement. He said he recalled being asked the question. He was then asked if he recalled the answer he gave. He stated he did not give the answer; that Mandanici gave it. The answer was then read to him and he was asked if he recalled making it. He said, "No." Brunello then stated, in response to a series of questions, that he had testified under oath before the grand jury in May of 1954. The witness was then interrogated as upon direct examination as to his narcotic activities, which were material to the case. In some instances he gave answers consistent with his grand jury testimony and in many instances he gave contrary answers. Where contrary answers were given, the witness was questioned as to whether he recalled being asked a particular question before the grand jury. He nearly always said he remembered the question being asked. He was then asked if he recalled his answer. In a number of instances, he said he did and then stated what his answer had been. It was only in those instances where he said he did not recall his answer or where he recalled it incorrectly that his answer

before the grand jury was read to him to refresh his recollection. Several times Brunello said his recollection was refreshed by this procedure.

Like Brunello, Artino also repudiated his prior grand jury testimony and written statements, which he claimed were obtained by duress on the part of narcotics agents. The government, surprised at his repudiation, followed the same procedure of reading to him portions of his contradictory grand jury testimony and written statements (Gov. 104–107).

Petitioners argue that since the witnesses repudiated their prior statements before they gave material testimony, the government should not have continued to question them. But even though they had lied in their previous statements, the government had a right to seek their testimony on the stand. As a result of this direct examination Brunello admitted, in corroboration of Mandanici's testimony, and without being refreshed by a reading of his prior statements, that he had driven to New York with Menage in June of 1952 and had sent a money order to DeSimone and Poliafico (Ric. 188–189, 191–192). And since the government properly continued the examination, it was proper for the government to read what the witnesses had previously said when their answers proved contradictory.

In *Hickory* v. *United States*, 151 U. S. 303, 309, the Court stated:

> When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him *for the purpose of refreshing his*

> ***recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise then as stated, although this incidentally tends to discredit the witness.*** [Emphasis added.]

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 231–235, there were 90 instances where grand jury testimony was read to hostile witnesses, over objection of counsel, for the purpose of refreshing the witnesses' recollections, and at least one of them testified that his grand jury testimony was not true. In holding that this procedure did not constitute error, the Court stated (310 U. S. at 233):

> As in case of leading questions, *St. Clair* v. *United States*, 154 U. S. 134, 150, such use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. See *DiCarlo* v. *United States*, 6 F. 2d 364, 367–368; *Bosselman* v. *United States*, 239 F. 82, 85; *Felder* v. *United States*, 9 F. 2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection. * * *

See also *Wheeler* v. *United States*, 211 F. 2d 19, 24–26, certiorari denied, 347 U. S. 1019; *Carrado* v. *United States*, 210 F. 2d 712, 721 (C. A. D. C.); *Pastrano* v. *United States*, 127 F. 2d 43, 45–46 (C. A. 4); *United States* v. *Graham*, 102 F. 2d 436 (C. A. 2), certiorari denied, 307 U. S. 643.

The trial judge clearly and thoroughly explained to the jury, when this prior contradictory matter was read, that the cross-examination was permitted only to refresh the witnesses' recollections and the questions and answers read from the grand jury transcript and the witnesses' prior statement were not evidence to be considered by them in this case (Ric. 194–195, 196–197; Polo. 39, 40–41, 90–91, 129–130; Gov. 79, 92).[11]

Petitioners also contend (Pet. 12–13) that allowing the narcotics agents to testify to the manner in which they obtained the statements from Brunello and Artino served improperly to bolster the prior inconsistent statements of the witnesses and give them weight beyond the limited purpose of refreshing the witnesses' recollections. This testimony by the narcotics agents was made necessary, however, by the declarations of the witnesses that their prior statements were obtained by the duress and threats of the narcotics agents. Cross-examination of Brunello and Artino on this damaging testimony was extensive. Therefore, to establish the credibility of the narcotics agents when they testified for the government, it was proper that the government have the narcotics agents deny the use of duress in obtaining the statements.

Finally, petitioners suggest that mere instructions

---

[11] Petitioners cite as obscure the instruction given when Artino's prior inconsistent statement was read to him (Pet. 13). They base their complaint on the ground that, while the instruction told the jury not to consider the statements as evidence, it did not tell them for what purpose it was to be considered. However, the first part of that instruction, which petitioners do not cite, clearly tells the jury the only purpose to be served by the statements was the refreshing of Artino's recollection (Polo. 90–91).

cannot erase from the jury's mind what they heard (Pet. 14). However, this Court has only recently reiterated its holding in *Opper* v. *United States,* 348 U. S. 84, 95, that our whole theory of trial depends upon the ability of a jury to follow instructions. *Dell Paoli* v. *United States,* No. 33, O. T. 1956, slip opinion, pp. 10–11. When instructions are as clear as those in this case, we must assume that the jury did follow them.

The evidence adduced through these two witnesses was cumulative and served only to corroborate some details given by the other government witnesses. Had they testified in line with their grand jury testimony and prior written statements, it would have added little additional weight to the government's case.

7. Petitioners cite several portions of the trial judge's charge to the jury as constituting reversible error.

a. In the portion of the charge dealing with the credibility of witnesses, the judge told the jury that, in weighing the credibility of Brunello's and Artino's testimony that the government agents used duress to obtain their statements against the agents' denial, they should consider that Brunello and Artino had repudiated sworn grand jury testimony (Ric. 259–260). Earlier, in line with instructions given at the time the testimony was admitted, the jury had been told to eradicate from their minds any impression left by the questions put and the answers given by Brunello and Artino in previous statements and grand jury testimony (Ric. 250–252). Petitioners contend

(Pet. 22–27) that the later instruction is inconsistent with the earlier and told the jury to remember what the first instruction told them to forget—the grand jury testimony.

We find no such conflict between these two instructions, each of which correctly states the law. The instruction on credibility did not tell the jury to remember the grand jury testimony itself; it told them to remember that Brunello and Artino had repudiated sworn testimony before a grand jury—a fact which both witnesses admitted on the stand, which was in no way based upon the grand jury testimony itself, and which was properly put before the jury as a factor bearing on credibility.

b. Petitioner Poliafico alleges as error (Pet. 27–31) the refusal of the trial judge to instruct the jury that evidence of his good character in itself might be sufficient to create a reasonable doubt as to his guilt.

The trial judge gave the following instruction (Ric. 260–261):

> The defendant Poliafico has offered evidence here of his good reputation. You will consider this evidence and determine its weight, together with all the other evidence in the case in arriving at your verdict as to the guilt or innocence of the defendant Poliafico.

The treatment to be accorded character evidence was set forth in the leading case of *Edgington* v. *United States,* 164 U. S. 361, which held that it is error for the trial court to tell the jury to consider character evidence only when the scales are already in balance. This Court stated (164 U. S. at 366) that:

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Some circuits, including the Seventh in *United States* v. *Donnelly*, 179 F. 2d 227, and the Tenth in *Hayes* v. *United States*, 227 F. 2d 540, upon which petitioners rely (Pet. 29–30), have read this language in *Edgington* to mean that an instruction on good character must charge that the character evidence be considered together with all the other evidence and, also, that it might in itself create a reasonable doubt. We do not believe that the statement in *Edgington* that character evidence may alone create a reasonable doubt was an announcement of a rule of law. It was merely a statement of what may result in some cases from the application of the correct rule *i. e.*, the rule that character evidence be considered together with all the other evidence. As the Second Circuit said in *United States*. v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 639, certiorari denied, 329 U. S. 742:

> * * * all that the Edgington case holds is that the trial court must not tell the jury to consider the character evidence only when the scales are already in balance. "But if the judge avoids that pitfall, as here he did, he has as many vari-

> ants among which to choose as he has in general; evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly." *Nash* v. *United States, supra,* 2 Cir., 54 F. 2d 1006, 1007.

See also, *United States* v. *Lowenthal,* 224 F. 2d 248, 249 (C. A. 2); *Gariepy* v. *United States,* 220 F. 2d 252, 261 (C. A. 6), certiorari denied, 350 U. S. 825; *Mansfield* v. *United States,* 76 F. 2d 224, 230–231 (C. A. 8); *Baugh* v. *United States,* 27 F. 2d 257 (C. A. 9), certiorari denied, 278 U. S. 639.

In the circumstances of this case, there is no occasion to resolve the slight conflict among the circuits. Unlike the *Donnelly* case, the situation here is not whether the jury believed one witness, who was an accomplice, or the defendant. In this case, several government witnesses testified directly to the narcotic activities of Poliafico, and, though they were accomplices, their testimony was bolstered by that of numerous other government witnesses as well as by various exhibits. Poliafico was, under the government's testimony, a central figure in the ring, so that if the jury credited the government's testimony against any defendant, it had to credit that testimony against him.

c. Petitioner Crisci argues (Pet. 40–41) that the instruction to the jury that, under the law, it could not "draw any inference of guilt" from his failure to testify (Ric. 260) was erroneous because it was not in the exact words of 18 U. S. C. 3481 which provides

that failure to testify "shall not create any presumption against him."

As held by the court below (Pet. 29a), it is not necessary to charge the jury in the exact language of the statute. The instruction given, together with the previous instruction that the defendants were clothed with the presumption of innocence which remained with them throughout the case until such time, if at all, the jury became convinced of guilt of one, or some, or all, beyond a reasonable doubt, completely safeguarded petitioner's rights under the statute.[12]

CONCLUSION

For the foregoing reasons, its is respectfully submitted that the petition for a writ of certiorari be denied.

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FEBRUARY 1957.

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[12] The case of *Bruno* v. *United States*, 308 U. S. 287, upon which petitioner relies (Pet. 41), involved a situation where *no* charge was given respecting the defendant's failure to testify and holds that the charge should have been given, but does not require that it be in the exact words of the statute.

U. S. GOVERNMENT PRINTING OFFICE: 1957

MAR 2 7 1957

JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 701.

SYLVESTER POLIAFICO,
SALVATORE LAZZARO,
NUNZIO ROMANO,
BEN YOSLOVITZ,
ANTHONY CRISCI,
SALVATORE PIERI,
MICHAEL ERRA,
ANTHONY NASELLI,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A REHEARING.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

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vs.

UNITED STATES OF AMERICA.

PETITION FOR A REHEARING.

Now come the undersigned attorneys for all appellants herein, and present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully state:

That this Court denied the petition for certiorari, that was filed herein, on the 4th day of March, 1957.

In petitioning for a rehearing the undersigned counsel feel impelled to direct this Court's attention to a number of the arguments which form the basis of the appeal in this case, and counsel must direct this Court's attention to the questions with which issue is taken.

GROUNDS RELIED UPON.

1. In the Petition for Certiorari it was contended in behalf of petitioners Poliafico and Pieri that venue of Counts Nos. 11 and 16 was improperly laid in the Northern District of Ohio because the evidence showed that the activities alleged in those counts took place in Buffalo, New York, and Erie, Pennsylvania (Petition 37-38) with no warning on the face of the indictment to the contrary.

2. The testimony of Filicia over objection of counsel, who apprised the Court that Filicia had played a dual role as a Government informer and as a defendant who sat for ten days in a Courtroom and who had previously prepared his case with present counsel and the defendants.

3. The refusal of the District Court to charge as requested in regard to petitioner Poliafico's character evidence, and whether such refusal constituted a conflict between the Second and the Sixth Circuits as against the Seventh and the Tenth Circuits.

4. Motions to dismiss indictment should have been granted on ground of variance as set forth in Kotteakos vs. U. S., 328 U. S. 750.

5. The petit jury was improperly drawn.

6. Admission of statements of co-conspirator over objection after termination of conspiracy.

7. The reading from the Grand Jury testimony of Government witnesses, Brunello and Artino, over objection, constituted prejudicial and reversible error.

ARGUMENT ON GROUND 1.

Petitioners Poliafico and Pieri contend that venue of Counts Nos. 11 and 16 was improperly laid in the Northern District of Ohio because the evidence showed that the activities alleged in those counts took place in Buffalo, New York, and Erie, Pennsylvania. Consequently, the evidence did not support these two counts. The evidence showed that narcotics were turned over in New York and Pennsylvania. The Government claimed that the petitioners had knowledge that the narcotics would be transported into the Northern District of Ohio and venue would lie in either state.

We believe such a holding as applicable to this case is erroneous. Counts Nos. 11 and 16 are substantive offenses. To prove either one of these offenses it would be necessary for additional evidence than was introduced. No narcotics either as exhibits, or otherwise, were introduced. All that did take place in regard to narcotics was talk. A witness explained that what was held to be the narcotics in these counts was destroyed. Co-conspirator, Mandanici, testifying fifteen months later, claimed that part of the alleged narcotics that he turned over in October, 1953, was mixed in with the mixture of 42½ ounces containing 7.2% heroin which was later destroyed by the agent and was not available in this case as an exhibit.

He was the only witness on that important phase of Counts Nos. 11 and 16. Nothing else was offered in evidence to support that this mixture of 42½ ounces, which is four times the amount allegedly received by him in Erie, actually included the alleged Erie package or that the alleged Erie package was actually narcotics. We objected at the time and later on in the charge, but it remained in the case. We feel that was error. If we are to accept merely the word of this type of persons, like

Mandanici and Filicia, without corroboration to make substantive offenses for which these petitioners received five and ten years, it would seem a very dangerous precedent and an unsafe method in which to conduct a case, highly improper and certainly containing all sorts of doubts and falsehoods. On this same evidence of this type of witness we must assume that these petitioners had possession from which venue can be established; we must assume that they had knowledge that it would be taken into interstate commerce; **we must assume that it was narcotics;** that it was unstamped and that it was imported into the United States illegally; we must also assume that all of this was done with knowledge. That is the best example that counsel know of for building an inference upon an inference coming from most questionable sources, unreliable in every manner, without any support or any evidence to corroborate them on the principal issues, namely, the original possession in Buffalo, New York, and Erie, Pennsylvania, by these petitioners. We believe more than that is required to establish a criminal case of this nature and this certainly has not been done in the two substantive counts for which Poliafico received ten years and Pieri received five years, to run consecutively with the conspiracy count of five years in each case.

That, of course, is not our only complaint in connection with these two substantive counts. Our first complaint is that venue was charged in the substantive counts as being in the Northern District of Ohio and not in either Buffalo or Erie. The evidence came in that the offenses were committed in Buffalo and Erie. This was the very first knowledge that counsel had of the commission of these offenses in Buffalo and Erie and not in the Northern District of Ohio, as laid in the indictment. We then im-

mediately objected and informed the Court that venue was not in the Northern District of Ohio and that the Court was without jurisdiction on these two offenses. These objections were timely. It must be remembered that in the substantive offenses it is charged that these alleged crimes took place in the Northern District of Ohio. The evidence as was introduced, as we stated above, through the most corrupt type of witnesses, indicated a completed transaction in Buffalo and in Erie. There was no evidence by anyone in connection with these two cities where these alleged offenses took place that there was any conversation or any understanding as to what would be done with the package that Mandanici received in Buffalo and in Erie. Nor is there any evidence that it was given with the knowledge of these petitioners to Angelo Filicia, who later claims to have taken the package to Cleveland. It was in every way a completed offense of purchase. No part of this offense was included as a facilitation of the transportation from either of these two cities to the Northern District of Ohio, and the evidence falls far short to come under the provisions of 18 U. S. C. 3237, as is claimed in the Government's Brief in Opposition on page 13, which is evidently based upon the case of *Stoppelli vs. United States,* 183 F. 2d 391. That case cited Section 3237 of Title 18, the Venue Section, which reads:

> "Except as otherwise expressly provided, by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

While this particular section might have applied to Stoppelli, it did not apply to Poliafico and Pieri. In the *Stoppelli* case it is very clear that venue could have been

placed in New York as well as in California. That while the transfer of the narcotics took place in New York and was transported to California, the reason that venue was laid in California was because an actual sale of narcotics took place in California after the shipment from New York, and of course that makes a different situation entirely. In *Stoppelli* it wasn't necessary to rely upon all these elements of knowledge of transportation by the original transferor in New York, or knowledge of concealment in California, because there was a clean-cut question there, and there was a sale of narcotics in California from this shipment. Of course the venue could be placed either in New York or in California. But nothing like that happened in the case at bar. No sale is charged to these petitioners in the Northern District of Ohio of these alleged narcotics. In fact, the Court dismissed the two counts of sale (Counts Nos. 10 and 15), because there was no evidence to establish them.

In this connection we believe the statement of the Government in the District Court in reply to a motion made by counsel for the defendants, and including the present petitioners, to acquit them because of insufficient evidence on the various counts and for other reasons that were given to the Court, the answer of the United States Assistant District Attorney, Mr. Cockley, becomes important because he was ready to concede that Counts Nos. 11 and 16 should also be dismissed because of this question of venue in the following language (page 101a, Appendix of Poliafico and Pieri):

> "Mr. Cockley: In that event I would like to cover several matters that were discussed yesterday, particularly the substantive counts pertaining to the charge of purchase; and I have reference first to count 3 of the indictment which charges the purchase under

Section 2553 (a). Under the state of the evidence, I believe it is clear that the transfer of that 35 ounces of heroin took place in New York.

"The case that I had reference to yesterday is the case of *United States vs. Pisano,* 193 Fed. 2d, 355, which dealt with the statutory presumption created by Section 2553 (a) of Title 26. However, in further reading that case I find that there was no evidence as to how the heroin there actually came into the possession of the party charged. The court did say under those circumstances that the presumption of venue went with the presumption of possession.

"However, in this case, where there is direct testimony as to the transfer and purchase which occurred in another jurisdiction, I believe the Government is prepared to concede that there is a substantial question as to jurisdiction and we will not further—"

It was there that the Trial Judge made the following remarks:

"The Court: Before you make such a concession I want to direct your attention to the *Stoppelli* case. Are you familiar with that?"

"Mr. Cockley: What case?"

"The Court: *Stoppelli vs. United States,* 183 Fed. 2d 391. That case cited Section 3237 of Title 18, the venue section, which reads:

'Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.'

"Now, in this case, although brief reference is made to the pertinent facts, it would appear that the heroin in question was brought from New York to California and the question was raised there that

> venue was in New York rather than in California, and the court, on the authority of that Section and the state of facts as I have briefly outlined them, held that Section 3237, Title 18 applied, and that venue on that section was in California. It is somewhat similar to our case, although not precisely so. It would seem that in the *Stoppelli* case it was a sale that was charged in California rather than a purchase. Here there is a purchase charged and no sale, and in addition to the purchase in the other counts you charge violation of 174 Title 21."

Even here the Trial Judge said that while (*Stoppelli*) "is somewhat similar to our case, although not precisely so, it would seem that in the *Stoppelli* case it was a sale that was charged in California rather than a purchase."

There is no denying the Court was in doubt when it suggested to the Government not to concede on these two counts because of his opinion of the *Stoppelli* case. And we believe, with good reason, as we pointed out, there is an entirely different factual question in *Stoppelli,* with an entirely different legal question as well. We think the Court was in error here. On page 14 of the Brief in Opposition the Government claims:

> "Moreover, as the Court below held (Pet. 25a), the question of venue was waived by the petitioners by their failure to raise it until the conclusion of the Government's case. See *Lii vs. United States,* 198 F. 2d 109-113 (9); *United States vs. Jones,* 162 F. 2d 72-73 (2); *Hagner vs. United States,* 54 F. 2d 446-447 (C. A. D. C.), Affirmed 285 U. S. 427."

This brings us up again to the question, "Did undersigned counsel have any evidence to go by that the Government did not mean what it said in Counts Nos. 11 and 16 that the transactions in these two substantive offenses took place in the Northern District of Ohio?" The answer

is, "No." We had no notice of any kind and no evidence that the Government did mean what it said by placing venue in the Northern District of Ohio, and not having any such knowledge or notice we could not raise such a question until we reached that particular phase of the evidence which was tending to establish the offenses in Buffalo, New York, and Erie, Pennsylvania, instead of the Northern District of Ohio. If Government counsel could advise this Court how the undersigned counsel knew, or should have known, from the face of the indictment that the Northern District of Ohio is not the real venue, it would be very helpful to the Court and counsel if they would point out where in those two counts we could find any such evidence. Not knowing that the Government intended to introduce completed offenses in other jurisdictions than the Northern District of Ohio, it should be obvious to Government counsel that the petitioners could not have attacked or raised the question of venue until this evidence actually came in, at which time we took the proper objections and exceptions. We think it is reversible error.

The District Judge, while expressing doubts about the applicability of the rationale of the *Stoppelli* case to the case at bar, nevertheless falls into the same error when he says:

> "There is an abundance of authority, I find, that where the question of venue is not raised, when the defendants go to trial without raising it, it is waived. However, it is a question on which my mind is not entirely closed at this time, but I think the Government would be unwise to make any concession until you examine the Stoppelli case."

Now we come to the citations that the Government gave in its reasoning why we are now precluded because

of our failure to raise it until the conclusion of the Government's case. They cite *Lii vs. United States,* 198 F. 2d 109-113. In this case Lii was indicted in the District Court for the District of Hawaii under 18 U. S. C. A. 2421. The indictment was for knowingly procuring an airplane ticket in California to be used by a woman in interstate commerce to go to Hawaii from California for the purpose of engaging in prostitution. The defendant went to trial in Hawaii and then at the end of the trial for the first time raised the objection claiming that the offense charged in the indictment was committed in the Northern District of California and not in the District of Hawaii, and therefore, that the Court was without jurisdiction. The Court, on page 113, says as follows:

> "Appellants here contend that, if committed at all, the offense charged in the indictment was committed in the Northern District of California and not in the District of Hawaii, thus, in effect contending that they were indicted, tried and convicted in the wrong district. The question thus attempted to be raised is a question of venue and not a question of jurisdiction. Having gone to trial on the merits without raising the question, appellants are not permitted to raise it here."

With that opinion we agree, but neither the facts nor the applicable law under that set of facts is applicable to the case at bar. In the *Lii* case the indictment was returned in the United States District Court for the District of Hawaii and claimed that the offense was committed in the District of Hawaii. Lii and his counsel both knew that the crime of purchasing the ticket was in the Northern District of California. They knew that because it so recited in the indictment. Therefore, it was the duty of counsel to raise the question of venue before trial because

of the error alleged in the indictment, and when he chose not to do it and actually went to trial in Hawaii, he waived his right and could not complain thereafter.

How different in our case. In our case the indictment alleges that these petitioners committed the substantive offenses in the Northern District of Ohio. We had no warning that the Government did not really mean that. We had to rely that the evidence would come in to show that the transfer and the purchase of the narcotics would be in the Northern District of Ohio. We could not raise any objection or question of venue under those circumstances. The *Lii* case, of course, is not applicable.

The next case the Government cites is *United States vs. Jones*, 162 F. 2d 72-73. This is a Second Circuit case and a similar question of venue arose therein. Jones was indicted under the Selective Service Training Act for failing to report at a camp in Lapine, Oregon. He was indicted in the Western District of New York for failure to so report. Jones went to trial in the Western District of New York and at the end of the case raised the question of venue, claiming that if he committed a crime at all it was in Oregon and not in the Western District of New York. The Appellate Court in ruling on this question of venue that he raised, as stated above, denied the plea on the ground that Jones was warned by the face of the indictment of the alleged improper venue and that the defendant waived the error by going to trial without first interposing an objection. With this ruling we wholeheartedly agree. But again, this is not the situation in our case. In the *Jones* case the warning was plain. It was right on the face of the indictment where he was accused of committing a crime in the Western District of New York, whereas he and his counsel knew that he was supposed to report in Oregon and if he failed to do so the crime that he committed was

in Oregon and the Court was certainly correct when it said on page 73:

> "But a defendant thus warned by the face of the indictment, of the improper venue, waives the error when he goes to trial without interposing an objection, as the defendant did here."

At a glance, anyone can see that the *Jones* case is not applicable to the case at bar. We were not warned in any way nor had any notice that we could expect any other places of venue except the Northern District of Ohio. We could not have raised any objection before going to trial in view of this natural expectation.

Then the third case that Government counsel cited is the case of *Hagner vs. United States*, 54 F. 2d 446-447 (C. A. D. C.) Affirmed 285 U. S. 427. In this case the appellants were indicted and tried in the Supreme Court of the District of Columbia upon a charge of using the mails to defraud. The evidence showed that the letters were deposited in the City of Scranton, Pennsylvania, and the letters were addressed to certain people in Washington, D. C. An indictment for fraudulently using mails to charge an offense at the place of receipt of the letters must allege that the letters were duly delivered there. However, the letters were deposited in Pennsylvania and the indictment did not on its face show the commission of any crime within the jurisdiction of the District Court at the District of Columbia. The indictment actually did charge an offense in Pennsylvania and not in the District of Columbia. In this case it shows that the defendants were arraigned, pleaded not guilty, and went to trial in the District of Columbia, and were convicted. On page 447 the Appellate Court raises this question, "Was their failure seasonably to object to the jurisdiction of the Trial Court a waiver of the right secured them by Article III, Section

II, of the Constitution to have a trial in the State and District in which the offense is alleged to have occurred?" The Court, on page 449, explains, in giving the answer to this question, that these defendants appeared in Court in the District of Columbia with their counsel. Then and there they had a right to have pleaded to the jurisdiction and raise whatever question of venue is involved herein. They did not. Instead they elected to go to trial on an indictment duly charging a violation of a law of the United States in a Court having a general jurisdiction of the class of offenses charged. Says the Court on page 449:

> "This, we think, was as complete an agreement to waive their Constitutional privilege to be tried in the District of Columbia as though it were in express words. * * *"

Here, again, we have a citation that is similar to the two cited cases above, but none of them is applicable, either in facts or the law, to the case at bar. We must again repeat we did not waive by any act of ours. We had a right to sit down and go to trial on that indictment because it alleged that the petitioners committed two offenses, in the two substantive counts, in the Northern District of Ohio. When the evidence did come in and establish the fact that the crimes were actually committed elsewhere, we immediately objected on the ground of wrong venue, and as this was the first opportunity to have entered the objection, as we stated before, it was the duty of the Court to dismiss as against these petitioners, Counts Nos. 11 and 16 because of wrong venue. By refusing to grant our request for dismissal of these two substantive counts and letting the matter go to the jury, and imposing a sentence, the Court committed prejudicial and reversible error as well as a violation of these petitioners' Constitutional rights.

ARGUMENT ON GROUND 2.

The Testimony of Angelo Filicia.

Petitioners contend that prejudicial error was committed in permitting the witness Filicia, after he pleaded guilty in the midst of the trial, to become a Government witness. We pointed out in our petition for certiorari that all the other witnesses were excluded from the courtroom until called. We are not overlooking the fact that Filicia was first a defendant before he became a witness. We nevertheless urge this point because of the unusual circumstances that prevailed when he took the stand as a witness after his plea of guilty in the middle of a trial where he was a defendant and one day later he became a witness for the Government after such plea. We are not unmindful that as a defendant he was compelled to be in the courtroom throughout the entire time until he pleaded guilty. What we are complaining about is what took place after such time.

When Filicia took the witness stand, Attorney Henry C. Lavine objected in the following language (page 167b,—Government's App.):

> "Mr. Lavine: Your Honor, I believe I made a motion before on this question of either a separation or, in the alternative, that the evidence be stricken out, the same motion that Mr. Redmond was talking about, and I stated that it was based on the community of interest between Filicia and the Government.
>
> The Court: What do you mean by a community of interest such as would exclude the testimony?
>
> Mr. Lavine: Well, my knowledge of it is this, your Honor, that Angelo Filicia cooperated with the attorneys for the defense, with the defendants, and sat in this courtroom for ten days.
>
> (Discussion had.)

I do not know what strategy he went through, but I know that he did confer with a number of the defendants and a number of counsel at the time we were preparing this case.

The Court: Are you suggesting that by reason of his position as a defendant he learned matters that the defense was going to use during the defense of the case?

Mr. Lavine: No question about it.

The Court: That he gave to the Government?

Mr. Lavine: That I don't know.

Mr. Canary: There is a difference, your Honor.

Mr. Lavine: Well, I don't know how the Government may proceed. He is still available, he can be a rebuttal witness, your Honor.

The Court: Well, it will be time enough if the Government uses him and he discloses anything that he learned about in his status as a defendant in the case before he pleaded guilty. But I understand you are not suggesting that any such information as came to his attention as a defendant before he pleaded guilty was communicated by him to the Government?

Mr. Lavine: No, I am not suggesting it. I do not know. But I say that the danger of it is there and, of course, we sat here with him as a co-defendant for ten days, and then, he has a dual role. He has information, whether he has conveyed it to them, I don't know, but he has been talking with these agents—

The Court: Mr. Lavine, you are voicing suspicion now.

Mr. Lavine: Yes, but they are reasonable suspicions, your Honor.

The Court: If there is anything to support them you bring them to the attention of the Court.

Mr. Lavine: Well, I am just renewing my motion now on that question.

The Court: There is no such ground as you suggested for granting the motion at this time."

The underlying facts surrounding this objection is due to evidence showing that Filicia was an informer for a considerable time prior to his taking the witness stand on the day in question. All of this was without the knowledge of counsel for these petitioners. As a defendant he and his counsel met with and was helping prepare the case for himself and others and naturally he obtained information and plans of the defense in several instances. Unbeknown to undersigned counsel, and to his own counsel, Filicia had been informing on several others of these defendants prior to the indictment and was in close contact with agents Ripberger, Voll and Chappell, and in such capacity was instrumental in at least six sales of narcotics to different persons in this case. He frequently met with these agents in different places (60a-61a-62a). They gave him the money and he proceeded to make the buys, and as stated in his own words, "I decided to play along with him." (62a.) He was working with them in September of 1953, during the time that he claimed he was in Erie, Pennsylvania, when as a result thereof two of these petitioners were charged with the two substantive offenses claimed to have been committed in September of 1953. In October of 1953 he was instrumental in the arrest of Mandanici in acting as an informer at the request of Voll and Chappell. (67a.) He worked with them at the end of October, 1953, when the Government agents stated that they prearranged some of the actions of Filicia in the handling of these narcotics. (150b, Government's App.) It should be noted that while both the Government agents and Filicia agree that he violated the law on numerous occasions, no arrest of Filicia was made for any offense that he committed until May, 1954, when he was arrested for a narcotics offense allegedly committed one year prior. We do not know all of the

relationship between the agents and Filicia but certainly we know enough to form an opinion that there was quite a community of interest between at least four of the Government agents and Filicia during a considerable period of time.

As was stated to the Court (167b, Government's App.), Filicia after indictment became a defendant and then began to prepare his case together with several of the other defendants, including Poliafico, and needless to say learned considerable of the plan of the defense. After that he sat in the courtroom for ten days with the defendants and their counsel and was in on their conferences and consultations pertaining to the defense. Then suddenly, on the tenth day of the trial, he offers a plea of guilty, whereupon the Government immediately dropped seven of the counts in the indictment as against him. Even his own lawyer had no prior knowledge of his intent to plead guilty. That, too, would indicate a community of interest between Filicia and the Government and surely his mingling and planning his defense with several of the other defendants, and from his actions and activities that we were apprised of during the trial, we are justified in claiming that there was a community of interest between Filicia and the Government, and we have a right to believe that he did disclose whatever he knew that might have helped him in obtaining the dropping of these seven counts.

We called this to the attention of the Trial Judge. It was timely, in fact it was before Filicia was permitted to take the witness stand, but the Court denied our objection. We believe such overruling constitutes prejudicial and reversible error.

On page 21 of the Brief in Opposition, the Government claims that ours is a parallel situation as was found in the

Carrado case, 210 F. 2d 712, 718-719. We disagree. In the *Carrado* case it was a different situation entirely. We have a special statute of the District of Columbia which is known as Section 23-110 of the District of Columbia Code 1951, the pertinent portion of said Section applicable is as follows:

> "When two or more persons are jointly indicted the Court may, before a defendant has gone into his defense, direct any such defendant to be discharged, that he may be a witness for the United States * * *."

The Court in the *Carrado* case held that the Code Section is not the source of the Trial Judge's authority to dismiss a defendant so he may be a witness against his former co-defendants, but is an immunity statute enacted for the benefit and protection of a defendant who is discharged for that purpose *before he has been in jeopardy*. The *Carrado* opinion mostly deals with the phrase, "Before a defendant has gone into his defense," and whether or not that begins from the moment the jury is sworn in any particular case. In any event, this is a particular statute applicable only to the District of Columbia; that while it resembles our case in one particular, it does not contain the important other particulars that we have set forth herein surrounding Filicia in the case at bar.

We say that the *Caldwell* case, 205 F. 2d 879, is an applicable case, rather than the *Carrado* case. In the *Caldwell* case one Bradley was proven to be engaged in a dual capacity as defense assistant and Government agent. He so conducted himself that he gained free access to the planning of certain members of the defense. In the case at bar Filicia gained free access with certain defendants in their lawyers' offices and learned some of the plans for the defense, and for ten days sat with the defendants and

their counsel and conferred with them and also learned about the plans of their defense. It was later discovered that at a time prior, and also at about the same time, he was acting in consort with the Government agents who were witnesses in this case against the defendants, and then suddenly, without notice to any of the counsel or even to his own counsel, who did not have any prior notice, he entered a plea of guilty, at which time seven of the counts were dropped the day before his testimony, which would indicate that there was a prearrangement that had been going on between Filicia and these Government agents prior to and during the hearing of this case which permitted him to sit in the Courtroom for ten days and listen to many witnesses' testimony and then enable him to take the witness stand on the eleventh day in corroboration of a good bit of that testimony.

Because of the actions of this Filicia and the manner in which he conducted himself, it is only natural to believe that he did convey information to some of the agents with whom he was dealing and in that way it would amount to giving away plans for the defense. While it is true that we do not know positively that this so happened, it is a very fair assumption in view of the close connection between Felicia and the government agents and their many dealings under those circumstances, as was disclosed by the testimony during the trial.

In order to be entirely fair about this, in view of counsel's calling it to the attention of the Court prior to Filicia's testimony, we contend the objection should have been sustained and Filicia's testimony constitutes, in our opinion, prejudicial error, and therefore we feel that the *Caldwell* case, rather than the *Carrado* case, applies.

ARGUMENT ON GROUND 3.

On page 30 of Government's brief in opposition, the pleader says:

> "Petitioner Poliafico alleges as error (Pet. 27-31), the refusal of the trial judge to instruct the jury that evidence of his good character *in itself* might be sufficient to create a reasonable doubt as to his guilt."

The Trial Judge did not give that charge. (Government's brief, page 30.)

Then this brief continues to interpret the meaning of *Edgington vs. United States,* 164 U. S. 361, and admits that this is "the leading case." However, the interpretation falls far short of the actual holding as well as the meaning of the case. For instance, the briefer claims that the only purpose and meaning of the holding in *Edgington* is (page 30):

> "* * * that it is error for the trial court to tell the jury to consider character evidence only when the scales are already in balance."

If that is a fair interpretation of *Edgington* it is only the *first part of that case.* The other part, which is just as important, if not more so, is completely omitted by the pleader:

> "The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it, the other evidence would be convincing."

This second part of that holding in *Edgington* is certainly applicable to petitioner Poliafico. *All* of the testimony against him came from three disreputable persons: Mandanici, a self-admitted narcotics peddler and a convicted felon; Consolo, a self-admitted narcotics peddler and convicted on several occasions for other felonies and

Angelo Felicia, a self-admitted narcotics peddler and convicted felon on several occasions. No other testimony was offered by the Government bearing on the charges of the indictment affecting Poliafico.

Poliafico, on the other hand, has never been convicted of any offense during his 45-year lifetime.

Isn't it fair to hold that the Supreme Court in *Edgington* had just such a situation in mind when it said:

> "The circumstances may be such that an established reputation for good character, if it is relevant to the issue * * *."

We couldn't get a more fitting case if we tried. Certainly the circumstances here establish that Poliafico's reputation was good and that such fact was relevant to the issue, inasmuch as there were no other witnesses except the three co-conspirators named above, each one of them a convicted felon in addition to being self-admitted dope peddlers whose testimony was pitted against Poliafico's, who is without conviction of crime.

We note that the briefer in the brief in opposition says, "we do not believe that the statement in *Edgington* that character evidence may alone create a reasonable doubt was an announcement of a rule of law." We confess we are at a loss to understand just what that means. Are we to consider the upper portion a rule of law and the lower portion merely a statement which could be ignored? Is it the contention of counsel that *Edgington* does not mean what it says? If it would be merely a statement expressing a result, then why did *Edgington* use the phrase, "would *alone* create a reasonable doubt," and then proceed and add further, "although without it the other evidence would be convincing"? Isn't that in itself "a rule of law"? And again, the Seventh and the Tenth Circuits both reversed cases where the District Court Judge refused to

charge as we have requested herein, and as *Edgington* actually states.

The briefer here chooses to follow the Second Circuit in Antonelli, as taken from the case of *Nash vs. United States,* 54 F. 2d 1006, and it would appear, also, that the Sixth Circuit is following Antonelli. But the Government brief in our case admits that some Circuits, "including the Seventh in *U. S. v. Donnelly,* 179 F. 2d 227, and the Tenth in *Hayes v. U. S.,* 227 F. 2d, 540," hold that an instruction on good character *must charge,* "that it might in itself create a reasonable doubt." That being the case there surely is a conflict between the Circuits, and it is vitally important here because in the case at bar the lines are drawn as tightly as they might possibly be drawn between the first part of the opinion and the latter part of the opinion because certainly the latter part of the opinion, where it explains what "the circumstances may be," can only mean the circumstances that are found in our case. Where the testimony upon which the jury must rely comes from a corrupt source as it did in our case as against a witness who has heretofore established a reputation for good character, and especially, as in our case, where it is relevant to the issue, having those circumstances and that situation, it is only sensible to believe that a reputation for good character *alone* would create a reasonable doubt in a case like ours, although without it, it may very well be that the other evidence would be convincing.

It isn't only that we would like to read *Edgington* in this way, and call to our support some other Circuits, including the Seventh and the Tenth as against the Second and the Sixth Circuits, but that an analysis of *Edgington* compels one to accept our interpretation of it rather than the other interpretation, which is subscribed to by the Government's brief in opposition.

Because of that, we feel that prejudicial error was committed by the Court in its refusal to so charge.

ARGUMENT ON GROUND 4.

Whether motions to dismiss Count I (conspiracy) of the indictment and a verdict of acquittal thereon in favor of Pieri's other petitioners should have been granted by the trial court on the ground of variance between the proof on trial and the charge in the indictment, and whether such refusal by the District Court constituted reversible error.

Reconsideration by this Honorable Court is sought because of what is believed to be a misunderstanding of the factual situation prevailing on trial of the instant case.

The rule applicable to this situation was pronounced by the United States Supreme Court in *Kotteakos vs. U. S.*, 328 U. S. 750, 90 L. ed. 1557, 66 Sup. Ct. 1239 (1946), wherein the Supreme Court reversed judgments of conviction against several supposed conspirators who had been jointly indicted under a single general charge of conspiracy. The facts of that case were markedly similar to the facts presented in the instant case:

Kotteakos and thirty-one (31) other defendants were jointly indicted for a single general conspiracy, together with several named co-conspirators. Nineteen (19) of such defendants were tried together. (Here eighteen (18).)

The case of thirteen (13) defendants was submitted to the jury, the exact number in the instant case.

In *Kotteakos*, it was developed on trial that eight (8) separate conspiracies were established, whereas in the present matter, not less than five (5) separate conspiracies were established.

In the *Kotteakos* case, no knowledge on the part of one (1) conspirator was shown to have existed as to any other supposed co-conspirators, except that one (1) defendant was common to all conspirators. In this matter, no knowledge on the part of any set of supposed conspirators was shown, as to the existence or activity of any other supposed group of conspirators (suppliers), except that each group or supplier was supposed to have had knowledge of the activities of those supposed conspirators composing the Cleveland "core."

The Supreme Court, in reversing the judgments of conviction in *Kotteakos*, used the analogy of the spokes of a wheel all meeting at a common hub (or "core") and found that an indictment charging a single general conspiracy was duplicitous, and was defective thereby, unless some cross-knowledge between the spokes of such wheel existed.

It was urged by petitioner Pieri before trial, on motion for severance, and again at the end of the Government's case, again at the end of the entire case, also after verdict, and also in support of a motion for new trial, that such variance existed, that acquittal should be directed, because of the necessary confusion resulting from the proof of all such separate conspiracies, and that substantial error had occurred.

Because of the number of the defendants and the number of the defendants' counsel, it was impossible for all defendants and all counsel to be within the bar of the Court. Because of the limitation of space, six (6) defendants were beyond the bar in the spectator section of the Court, and six (6) attorneys representing eight (8) defendants were also without the bar. The petitioner, Pieri, and counsel for such Pieri were included in those persons placed in the spectator section.

In addition, because of the limited space, because of seating arrangements, and because of the congestion in the well of the Court, four (4) of the defendants were physically separated from counsel and could not be interviewed by counsel without counsel crossing the trial Court, and speaking to any such defendant in the presence of others, or in half-asides.

The Courtroom is of average size and was the largest room available in the District Court for trial. The acoustics however, of such Courtroom, were both by the admission of the Court, and by actual demonstration on trial, of such character that an amplification system was necessary. However, in providing such amplification system, the trial Court secured only a microphone for the witness testifying, had none for itself, and had none available for any counsel. As a consequence thereof, counsel for all defendants, and particularly counsel for those defendants beyond the bar, which included the petitioner Pieri, were constantly faced with a situation where all or a good part of the questions, answers, objections, rulings and arguments were muffled, and were in whole or in part, out of the hearing of such counsel.

All defendants' counsel objected during the course of trial to the manner of trial, and to the trial circumstances, and all defendants moved for severance on various grounds, particularly upon the grounds stated in *Kotteakos vs. U. S.*, 328 U. S. 750, 90 L. Ed. 1557, 66 Sup. Ct. 1239, both before trial, during and after trial.

During the course of one trial day, the record disclosed that there were fifty-seven (57) specific statements by counsel to the Court that the witness could not be heard, so that the witness was forced to repeat. This, in spite of the fact that the witness, and the witness alone, had available amplification equipment.

It is fair to say that all counsel, both for prosecution and defense, acted with the highest regard for the Court, and with courtesy toward one another, and that all counsel exerted every effort to so conduct the trial as to expedite such trial, and so as to minimize the trial difficulties insofar as possible. However, in spite of the best efforts of counsel, and in spite of the consideration of the Court, the trial conditions themselves were such as to render the proceedings entirely beyond the ability of counsel to cope with the same.

It is respectfully submitted that reconsideration should be given in this respect as to petitioners Pieri and Erra, particularly Pieri. In all material respects, the instant case presents an alleged conspiracy analogous to the "wheel" found in *Kotteakos* (*supra*), with substantial error present because of a failure to direct separate trial as to such petitioners.

That particularly as to petitioner Pieri, the testimony of Government witnesses, even if believed, was to the effect that the last supplier transaction occurred at least seven months prior to any activity on the part of the said Pieri, that further the alleged conspiracy had suspended, or may have inferentially ceased, for other reasons, at least six months before any such alleged activity on the part of the said Pieri, and that considerable and heated differences had arisen between the various alleged conspirators constituting the Cleveland "core," of which "core" Pieri had no part, all leading to a factual question as to whether one conspiracy had ceased and a second alleged conspiracy had later come about.

This fact question was *not* put to the jury, and this Court is not, therefore, bound by any finding.

That the situation is not at all analogous to that found in *U. S. vs. Tramaglino*, 197 F. 2d 928 (C. A. 2), where

a relatively small group of defendants was involved, where all defendants were known to each other, as would appear from the decision therein, and where all persons dealt either upon the same level or in chain fashion.

That further because of the coincidental application of the rule in the instant case of the rule enunciated by this Court in *Krulewitch vs. U. S.*, 336 U. S. 440, 93 L. Ed. 790, and recently applied by this Court in *Paoli vs. U. S.*, 352 U. S. ____, 1 L. Ed. 2d 278, 77 S. Ct. ____ (adv. bull. No. 5 L. Ed.), decided January 14, 1957 (treated *infra*), it is deemed of sufficient importance for this Court to review upon both bases as to such petitioners.

ARGUMENT ON GROUND 5.

During the empanelling of the jury the appellant objected to the method and manner of the selection of the petit jury and the Grand Jury by claiming that there were certain racial discriminations in the selection of this jury panel by the Jury Commissioner and the Clerk of the District Court. Counsel for the petitioners then and there requested a hearing upon this claim, specifically requesting that the Jury Commissioner be sworn. The Court refused to grant such a hearing.

In addition to material supplied heretofore in petition for certiorari herein, there is herewith submitted, and the reconsideration of the Court is asked of the following matter.

Petitioners challenge the petit array, during the drawing of a jury, and prior to the swearing of any juror, upon representation of belief that the method of empanelling such petit array did not comply with the constitutional and legal requirements therefor, and demanded a hearing thereon. Such demand was denied.

During the course of argument, certain statement of apparent exclusion were made, as submitted heretofore, and further, the attention of the Court was called to the matter of *U. S. vs. Brandt* (not reported) upon which a similar challenge to a Grand Jury array had been made before the same trial judge, where hearing had been permitted, and apparent exclusion discovered.

That it is submitted that in due course the conviction of several defendants in such action *U. S. vs. Brandt* will be before this Court, and that among other questions for review therein there will be raised the denial by the trial court of a dismissal of the indictment therein, because of the failure to properly empanel a Grand Jury.

That the method and manner of empanelling a Grand Jury and a petit array are identical in the Northern District of Ohio.

That in the event that this Court later finds in such action that such method of empanelling was improper, without inquiring, however, into such question herein it might well deprive these petitioners of substantial justice, in that they would then be beyond review.

ARGUMENT ON GROUND 6.

The oral declaration of co-conspirators, made long after determination of the alleged conspiracy terminated, were admitted into evidence by the trial Court over the repeated and strenuous objections of all counsel for all petitioners, and that such constituted reversible error.

That this question is of the highest importance, and due to inadvertence was not submitted in petition for certiorari, such petition for certiorari having been assembled from various points, through the efforts of various attorneys.

That the alleged, general conspiracy herein, was charged to have begun in the month of January, 1952, and was shown to have terminated, if such conspiracy existed, on the 22nd day of October, 1953, with the arrest of one James Mandanici.

That after such arrest of such Mandanici, in the early part of the year 1954, such Mandanici plead guilty to a substantive offense involving narcotic drugs; he was thereupon imprisoned, under sentence in various Federal institutions.

That to the date of his sentence, and for some weeks thereafter, to a date in March, 1954, said Mandanici made no declaration, oral or written, involving any person other than himself.

That beginning in March, 1954, long after the cessation of the alleged conspiracy, the said Mandanici first began to make oral and written declarations involving prior alleged conspirators, and renewed such declarations by oral testimony on trial.

That although certain narcotics were established as such, on trial, no independent testimony or other evidence connected the petitioner Pieri, petitioner Erra, or other petitioners therewith, except by such declarations of the said Mandanici or other co-conspirators. That in each instance, the declaration of any alleged co-conspirator which related to any other alleged co-conspirator, was made for the first time long after the termination of the alleged conspiracy, and only after the first such declaration made by the conspirator Mandanici in March, 1954.

That as to petitioner Pieri, the only evidence directly connecting him with any of the alleged crimes was the testimony of the said Mandanici, and the testimony of one Filicia; that the declarations of the said Filicia all occurred subsequent to March, 1954.

That no independent proof of any substantial nature whatsoever was adduced on trial to connect petitioner Pieri with any such activity, and that the conviction of such Pieri must rest solely upon such declarations of the said Mandanici and the said Filicia.

That the supposed activities of petitioner Pieri occurred between May, 1953, and September, 1953, that the arrest of the said Mandanici, which terminated the alleged conspiracy, occurred October 22, 1953, and that the first declaration on the part of either Mandanici or Filicia occurred in March, 1954.

That it is submitted under the rule enunciated in *Krulewitch vs. U. S.*, 336 U. S. 440, 93 L. Ed. 790, and recently applied in *Paoli vs. U. S.* (cited *supra*), such declaration of a co-conspirator cannot be received in evidence except against the person uttering the same and against any person specifically present at the time of occurrence about which such declaration is made, and that even then, such may be received under such limited conditions only if the Court properly instructs the jury to apply such declaration against such particular individuals and no other.

In the instant case the Court not only permitted the receiving of such evidence, over the repeated objection of all counsel, but also further directed that it be received as to all persons found joining in such conspiracy.

Needless to say, the Trial Court gave no limiting instructions to the jury, but gave a contrary instruction.

Of importance here, petitioner Pieri made motion before trial for separate trial, and that such motion was joined in by all petitioners. That such motion was denied as to all petitioners and exception taken.

Particular attention should be paid to the factual circumstances of trial, and the mass nature thereof, as recited heretofore.

Even appropriate instructions would have been hopelessly confusing to the jury, in the light of the comments made in the concurring opinions in *Krulewitch* (*supra*); a fair trial could not have resulted.

ARGUMENT ON GROUND 7.

When witnesses Brunello and Artino repudiated their prior Grand Jury testimony by stating flatly that the testimony they gave to the Grand Jury was false, it is our contention that in this event the prosecution should not have proceeded by reading questions and answers from the Grand Jury transcript and in that way spread before the petit jury all the testimony that these two witnesses gave in secret seven months prior. We objected to this testimony, first because the Government claimed the right to elicit this information by reading from the Grand Jury transcript on the ground that it was being done to refresh the witnesses' memory and also on the ground of surprise. It must be remembered that our objection was not made for the purpose of foreclosing the Government from eliciting information or seeking testimony from these two witnesses. Our objection was on the ground that the Government had no right to use the Grand Jury transcript for the reasons they gave, namely, refreshing the witnesses' memory and on the ground of surprise, because when a man says that he lied in his testimony to the Grand Jury, then there is nothing to refresh, no matter how surprised the prosecution may be.

We think it was error on the part of the Court to permit the District Attorney to use this Grand Jury tran-

script by way of questions and answers because he actually got before the petit jury the testimony that these witnesses gave to the Grand Jury, and all of this under the guise that they were attempting to refresh the memory of a witness who never stated that he forgot anything. When a man said he lied in his testimony, that means that he remembered what he said but he is confessing to lies. There is nothing to refresh here. The only reason the District Attorney proceeded was, as we said, to get this alleged false testimony before the petit jury and in that way he accomplished another factor, namely, he impeached his own witness.

We hold now, and always have contended, that the Government had a perfect right to seek testimony from Brunello and Artino regardless of their statement that they lied in their previous testimony. But the testimony they had a right to seek was by any questions and answers without having any regard to the previous questions and answers before the Grand Jury, and certainly were not permitted to use the Grand Jury transcript by asking the very same questions and reading the answers that the witnesses said were all lies.

If the Government had pursued the proper procedure, if it wanted to obtain evidence from Brunello and Artino it could have done so by new questions and answers, and that is something no one could have objected to. But when they proceeded in the manner they did, they prejudiced the entire case involving every defendant in the Courtroom, and when the District Judge permitted them to do so, over objection, he was in error and prejudicial error resulted for which a new trial ought to be granted. Such are the holdings in the very cases that were cited by the Government, as well as were cited by undersigned Coun-

sel in their briefs heretofore. To the same effect is *U. S. vs. Socony-Vacuum Oil Company*, 310 U. S. 150.

There could be no other explanation except the only one, specifically, that the Government accomplished by proceeding over objection what they could not have accomplished in any other way, and that is to spread before the petit jury practically all the evidence these witnesses gave before the Grand Jury.

Therefore, it is reasonable to deduce that in the case at bar this Grand Jury testimony was used not for the purpose of refreshing the recollection of the witnesses, but was used solely and deliberately to get before this petit jury this Grand Jury testimony, which is exactly in line with what the Court said in the *Socony-Vacuum* case, 310 U. S. 150, 60 S. Ct. 811, where on page 849 the Court said:

> "If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the Jurors so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise, there would be error where under the pretext of refreshing a witness' recollection the prior testimony was introduced as evidence."

The admission of this testimony, under the circumstances in our case, was prejudicial and reversible error.

CONCLUSION.

For the reasons hereinabove set forth we respectfully urge this Honorable Court to grant the petitioners a rehearing.

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Certificate of Counsel.

We, the undersigned counsel for the petitioners in the above-entitled cause, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

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